No. (1)

Supreme Court, U.S.
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In the

Supreme Court of the United States

TOMMY ZEKE MINCEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a driver who borrows a rental car with the renter's, but not the owner's, permission have a reasonable expectation of privacy in the car?

2. If so, can the rental company unilaterally and immediately extinguish the driver's reasonable expectation of privacy during a traffic stop by instructing the police not to release the car to the driver?

LIST OF PARTIES

United States of America

Tommy Zeke Mincey

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a – 21a) is available at 2008 WL 5063872. The district court's ruling from the bench on the suppression motion (App., *infra*, 22a – 24a) is unreported.

JURISDICTION

The court of appeals entered its judgment on November 24, 2008. On December 22, 2008 the court denied a timely petition for rehearing en banc (App., *infra*, 25a). On March 5, 2009, the Chief Justice extended the time within which to file this petition until May 21, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The Fourth Amendment protects a person from unreasonable searches and seizures if he can "demonstrate that he personally has an expectation of privacy in the place searched, and that his

expectation is reasonable." *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998). An expectation of privacy is "reasonable" when it is consistent with "widely shared social expectations." *Georgia* v. *Randolph*, 547 U.S. 103, 111 (2006).

This case raises two issues: (1) whether a person enjoys a reasonable expectation of privacy in a rental car borrowed with the renter's, but not the owner's, permission, and (2) if so, whether the rental company can unilaterally and immediately extinguish that reasonable expectation of privacy by instructing the police during a traffic stop not to release the car to the driver.

Those issues have divided the lower courts. As the Fourth Circuit acknowledged below, there is a three-way split on the threshold question whether a driver who is not listed on a rental agreement has reasonable expectation of privacy in a rental car. App., *infra*, 13a – 15a. Three circuits and one state supreme court have held that a driver has a legitimate expectation of privacy in a rental car so long as the renter permitted him to drive it. Two other circuits, including the Fourth Circuit below, have held that a driver has a reasonable expectation of privacy in a rental car only if the rental company permitted him to drive it. Finally, one circuit and one state court of last resort have held that the reasonableness of an unlisted driver's expectation of privacy in a rental car depends on the totality of the circumstances.

That threshold question is tied to the related question—arising from the police practice of calling car rental companies during traffic stops to seek their permission to search rental cars—whether a

car rental company can telephonically extinguish a rental car driver's expectation of privacy during a traffic stop. The Eleventh Circuit has correctly held that those telephone calls do not extinguish the drivers' privacy interests because a property owner's latent right to retrieve its property cannot, particularly during a police encounter, negate the legitimate privacy interest of someone who possesses that property. The Fourth Circuit below and the Montana Supreme Court, however, have held otherwise. Their approach subjects the privacy interests of all rental car drivers to the instructions that companies give when telephoned by police.

Given that traffic stops of rental cars routinely lead to phone calls between police and car rental companies, the Fourth Circuit's subsidiary holding is virtually indistinguishable from its core holding that unlisted drivers cannot reasonably expect privacy in rental cars. For that reason, and because the lower courts' decisions concerning the privacy interests of unlisted drivers are hopelessly fractured, the two holdings at issue here should be considered, and reversed, in the same case.

A. Factual Background

1. On October 3, 2005, Tommy Zeke Mincey was driving a rental car on Interstate 77 near Statesville, North Carolina. App., *infra*, 3a. Sergeant Randy Cass stopped Mincey for following the vehicle ahead of him too closely. *Ibid.* Sergeant Cass asked Mincey for his driver's license and the car's registration. *Ibid.* Mincey knew that the car was not registered in his name: His girlfriend had rented the car from Armada Rental Company in her name, and she had given Mincey her explicit permission to drive it. *Id.*

at 7a n.3. Mincey gave the officer the rental agreement and explained that the name on it was his girlfriend's. *Id.* at 3a.

Sergeant Cass then called the rental company and explained that he had stopped one of its cars for a traffic violation and that the driver, the sole occupant, was not listed on the rental agreement. App., *infra*, 5a. Sergeant Cass, however, did not mention that Mincey claimed to have received permission to drive the car from the person whose name *did* appear on the agreement.

The company employee who answered Sergeant Cass's call confirmed that Mincey had not signed the agreement. App., *infra*, 5a. When Sergeant Cass then asked for the company's consent to search the car, the employee responded that someone would have to call Sergeant Cass back. *Ibid.* About five minutes later, a different employee—who, like the first one, was never told about Mincey's connection to the renter—called Sergeant Cass. *Ibid.* Although at the later suppression hearing the employee did not recall giving him permission to search the car, Sergeant Cass testified and the district court found that the employee consented to a search of the car and told Sergeant Cass not to release it to Mincey. *Id.* at 6a n.2.

A moment later Sergeant Cass told Mincey to leave the car and handed him a warning citation. He also told Mincey that he had spoken to the rental company and that he could not release the car to him since Mincey was not listed on the rental agreement. App., *infra*, 6a – 7a. Sergeant Cass then offered to drive Mincey to the next exit on the interstate and told him that the police would search the car. *Id.* at

7a. Before the search began, Mincey asked to return to the car and retrieve his belongings. Sergeant Cass refused that request. *Ibid.* Several minutes into the ensuing search, Sergeant Cass pulled up the console around the car's gearshift and discovered a plastic bag containing 140 grams of heroin. *Id.* at 7a – 8a. Mincey was then arrested.

B. Proceedings In The District Court

Three weeks later Mincey was indicted for possession with intent to distribute at least 100 grams of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. App., *infra*, 10a. He moved, on Fourth Amendment grounds, to suppress the evidence obtained from the search, on the theory that the warrantless search violated his reasonable expectation of privacy in the car. To establish that privacy interest, Mincey elicited his girlfriend's testimony, at the suppression hearing, that she rented the car for him because he did not have a credit card, and that she gave him permission to drive it. 6/6/06 Tr. 52-54. He also cited cases from the Fifth, Sixth, and Eighth Circuits holding that the renter's permission could ground a driver's reasonable expectation of privacy in a car even if the driver's name did not appear on the rental agreement. Br. in Supp. of Mot. to Suppress at 8.

At the close of the suppression hearing, the court ruled from the bench. It held that Mincey had no privacy interest that would permit him "to contest the search and seizure of the rental car," and that "the rental car agency gave permission for the search of the vehicle." App., *infra*, 24a.

Mincey was later convicted and sentenced to 150 months in prison and eight years of supervised release. App., *infra*, 11a.

C. Proceedings In The Court Of Appeals

Mincey appealed and the Fourth Circuit affirmed. The court of appeals first held that its precedent foreclosed Mincey's argument that his girlfriend's permission gave him a reasonable expectation of privacy in the car. In *United States* v. *Wellons*, 32 F.3d 117 (4th Cir. 1994), it noted, "we held definitively that an unauthorized driver of a rental vehicle has no legitimate privacy interest in the vehicle and therefore cannot contest a warrantless search of the vehicle on Fourth Amendment grounds." App., *infra*, 12a – 13a. It also noted that "[w]e further held in *Wellons* that this conclusion was not altered where, as here, the authorized lessee allows the unauthorized driver to drive the rental vehicle, as an unauthorized driver still does not have permission of the rental company, the owner of the vehicle." *Id.* at 13a.

The Fourth Circuit acknowledged that the issue had divided the courts of appeals. It asserted that three circuits—the Fifth, Tenth, and Eleventh—agreed with it; that two—the Eighth and Ninth—disagreed, holding that "an unauthorized driver of a rental vehicle may have a legitimate expectation of privacy in the vehicle * * * if he is able to establish that the authorized renter/driver gave him permission to drive the vehicle;" and that one—the Sixth—"has adopted a totality of the circumstances analysis on the issue, holding that permission of the lessee to drive a rental vehicle is but one of many factors to be considered in determining whether an

unauthorized driver has a legitimate privacy interest in a rental vehicle." App., *infra*, 13a – 15a. After reviewing those cases, however, the court of appeals saw "no persuasive reason to overturn or alter" *Wellons*. *Id.* at 13a.

In a footnote, the Fourth Circuit further held that the rental company, by instructing the police not to release the car to Mincey, unilaterally and immediately extinguished any reasonable expectation of privacy that Mincey might have enjoyed when the traffic stop began. The Fourth Circuit reasoned:

> Even assuming Mincey had the permission of the authorized renter to drive the rental vehicle in this instance, any such permission clearly terminated once the rental company affirmatively advised Sergeant Cass that Mincey, as an unauthorized driver under the rental contract, was not entitled to possess the vehicle and that the vehicle was not to be released to Mincey at the scene of the traffic stop. In other words, *at that moment*, any permission that had previously been extended to Mincey by the authorized driver of the rental vehicle was effectively extinguished by the rental company, the actual owner of the vehicle and issuer of the subject rental contract.

App., *infra*, 14a n.9 (emphasis added).

The Fourth Circuit thus rejected Mincey's argument on two grounds: (1) that only the owner's, not the renter's, permission could ground a reasonable expectation of privacy and (2) that the car rental company's instruction to the police not to release the car to Mincey terminated the actual

permission he had from his girlfriend, the renter, to drive it.

In light of those holdings, the Fourth Circuit stated that it was declining to decide whether, if Mincey actually had a reasonable expectation of privacy in the car when Sergeant Cass searched it, the rental company's consent validated the search. App., *infra*, 15a – 16a. It thus affirmed the district court's judgment.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve The Deep And Acknowledged Three-Way Split Among The Circuits And States Concerning Whether A Driver Who Is Not Listed On A Rental Agreement Can Have A Reasonable Expectation Of Privacy In A Rental Car

A. The Courts of Appeals Are Deeply Divided As To Whether A Driver Who Drives A Rental Car With The Renter's, But Not The Owner's, Permission Has A Reasonable Expectation Of Privacy In It

As the court below expressly acknowledged, the circuits are divided as to whether a person driving a rental car—with the renter's, but not the owner's, permission—has a reasonable expectation of privacy in that car. App., *infra*, 13a – 15a; see also *United States* v. *Haywood*, 324 F.3d. 514, 516 (7th Cir. 2003) ("Several circuits have examined [this] issue, though they have failed to reach a consensus."). Six circuits, as well as two state courts of last resort, have addressed the question, and they have reached three different conclusions. The depth of this conflict and the pervasiveness of lower court confusion about this recurring question of constitutional law warrant this Court's review.

1. The Fifth, Eighth, and Ninth Circuits, as well as the Supreme Court of New Mexico, have held that a driver has a reasonable expectation of privacy in a rental car so long as he has the renter's permission to drive it. *United States* v. *Kye Soo Lee*, 898 F.2d 1034, 1038 (5th Cir. 1990); *United States* v. *Best*, 135 F.3d 1223, 1225 (8th Cir. 1998); *United States* v. *Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) (per curiam); *United States* v. *Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006); *State* v. *Van Dang*, 120 P.3d 830, 834 (N.M. 2005). These courts agree that a "driver who received permission to use a rental car and has joint authority over the car" has a legitimate expectation of privacy in that car "to the same extent as the authorized renter." *Thomas*, 447 F.3d at 1199; accord *Best*, 135 F.3d. at 1223, 1225 (ordering that if the defendant could prove he had received permission from the renter to drive the car, then he could be found to have had a legitimate expectation of privacy in the vehicle); *Muhammad*, 58 F.3d at 355 (whether a defendant has an objectively reasonable expectation of privacy turns on whether there is consent or permission from the renter of the car); *Kye Soo Lee*, 898 F.2d at 1038 (finding a legitimate expectation of privacy where, although defendants "did not rent the truck," they were operating it with the renter's permission).[1]

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[1] The decision below mistakenly said that the Fifth Circuit agreed with its view. App., *infra*, 13a & n.8. In two cases decided within two months, different panels of the Fifth Circuit took opposite positions on the issue. The earlier case, *Kye Soo Lee*, upheld the driver's reasonable expectation of privacy in the rental vehicle, and the later case held otherwise. See *United States* v. *Boruff*, 909 F.2d 111, 117 (5th Cir. 1990). The Fourth Circuit relied on *Boruff*, but the Fifth Circuit's strict "prior panel" rule makes *Kye Soo Lee* binding precedent.

Relying on this Court's statement in *Rakas* v. *Illinois* that "the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place," 439 U.S. 128, 143 (1978), these courts reason that a legitimate expectation of privacy cannot depend "on a rental agreement to which the * * * driver was not a party." *Thomas*, 447 F.3d at 1198-1199; see also *Kye Soo Lee*, 898 F.2d at 1038 (quoting *Rakas*, 439 U.S. at 143).

Instead, applying this Court's command to consider social expectations, these courts hold that a legitimate privacy interest may be shown "'*either* by reference to concepts of real or personal property law *or* to understandings that are recognized and permitted by society.'" *Thomas*, 447 F.3d at 1197 (quoting *Carter*, 525 U.S. at 88) (emphasis added);

Goodman v. *Harris County*, 443 F.3d 464, 467-478 (5th Cir. 2006); see *United States* v. *Dortch*, 199 F.3d 193, 205 (5th Cir. 1999) (Garwood, J., dissenting) ("*Kye Soo Lee* predated *Boruff*, and if the two are in conflict we are bound by *Kye Soo Lee*.").

The Fourth Circuit also noted that *Kye Soo Lee* "does not even address the fact that the hired rental truck drivers were not listed as authorized drivers on the subject rental agreement." App., *infra*, 14a n.8. But *Kye Soo Lee* did not address the rental agreement because it made no difference. As the Fifth Circuit explained, "[the defendants] were operating the truck with [the renter's] permission" and had been "entrusted [with] the vehicle and its contents." 898 F.2d at 1038. Those facts alone, in the court's view, supported the district court's finding that the defendants had a reasonable expectation of privacy in the car. *Ibid.* But see *United States* v. *Seeley*, 331 F.3d 471, 472 (5th Cir. 2003) (distinguishing *Kye Soo Lee* on the same ground as the Fourth Circuit).

see also *Muhammed*, 58 F.3d. at 355 (equating objective legitimacy of privacy expectations with "evidence of consent or permission of the lawful owner/renter"). As Judge O'Scannlain explained for the Ninth Circuit in *Thomas*, "the question [is] whether an unauthorized driver has a possessory * * * interest in the car," 447 F.3d at 1197, but that interest does not hinge on whether the driver has "an ownership interest," *id.* at 1198. Instead, the driver need only show "'joint control' or 'common authority,'" *ibid.*, which arises whenever the driver "has received permission to use the car," *id.* at 1199.

2. Two circuits—the Fourth and the Tenth—take the opposite view.[2] App., *infra*, 12a – 13a; *United States* v. *Roper*, 918 F.2d 885, 887-88 (10th Cir. 1990); *United States* v. *Obregon*, 748 F.2d 1371, 1375 (10th Cir. 1984).

Notwithstanding this Court's admonition that Fourth Amendment reasonableness is "not controlled by" property law, *Randolph*, 547 U.S. at 111 (citing *Rakas*, 439 U.S. at 144 n.2), these courts have held that the reasonableness of a driver's privacy interest

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[2] The Fourth Circuit mistakenly described the Eleventh Circuit as also "in accord" with its position. App. *infra*, 13a (citing *United States* v. *McCulley*, 673 F.2d 346 (11th Cir. 1982)). *McCulley* stands for the quite different proposition that *potential passengers* have no reasonable expectation of privacy in a rental car. *Id.* at 352. In 1998, the Eleventh Circuit referenced the circuit split over the first question presented here but did *not* claim to have chosen sides. *United States* v. *Cooper*, 133 F.3d 1394, 1400 & n.13 (11th Cir. 1998); see also *United States* v. *Crisp*, 542 F. Supp. 2d 1267, 1276 (M.D. Fla. 2008) (noting that the issue "has not been decided by the Eleventh Circuit").

depends entirely on whether the person who authorized the driver's use of the car was the car's *legal owner*. See *Roper*, 918 F.2d at 888 (holding that a driver who had received the lessee's permission to drive had no reasonable expectation of privacy in the rental car because "[h]e was not the owner nor was he in lawful possession or custody of the vehicle [and] was [not] listed as an additional driver in the rental contract."); *Wellons*, 32 F.3d at 119 n.2. (holding that someone driving with the lessee's permission had no reasonable expectation of privacy in the rental car because "[he] did not have the permission of Hertz Corporation, the owner of the automobile," to drive it). Under this reasoning, only the permission of the lessor, not the lessee, can ground a reasonable expectation of privacy in the car.

The Fourth Circuit has taken the property-based view of the Fourth Amendment to extraordinary lengths. It has twice held, including as recently as this month, that an unlisted driver has no legitimate expectation of privacy in a rental car even if *the driver's wife* rented the car. *United States* v. *Luster*, No. 08-4793, 2009 WL 1178527, at *1 (4th Cir. May 4, 2009) (unpublished; per curiam); *United States* v. *Hannah*, 168 F.3d 483 (Table), No. 96-4005, 1998 WL 911709, at *3-4 (4th Cir. Dec. 31, 1998). It has also held that a rental agreement's mere *silence* regarding unlisted drivers cuts against an assertion of privacy by anyone but the renter. *United States* v. *Rollack*, 173 F.3d 853 (Table), No. 98-4272, 1999 WL 104806, at *5 (4th Cir. Mar. 1, 1999) (holding that a passenger did not have a reasonable expectation of privacy in a van, in part because the lease did not "explicitly permit" him to drive it).

3. The Sixth Circuit and the Texas Court of Criminal Appeals take an intermediate approach. They apply a "totality of the circumstances" test to determine whether a driver not listed on a rental contract has a legitimate expectation of privacy in a rental car. *United States* v. *Smith*, 263 F.3d 571, 586 (6th Cir. 2001); *Parker* v. *State*, 182 S.W.3d 923, 927 (Tex. Crim. App. 2006).

In *Smith*, the Sixth Circuit expressly rejected a "bright line test." It reasoned that a legitimate expectation of privacy cannot be "based solely on whether the driver of a rental vehicle is listed on the rental agreement as an authorized driver." 263 F.3d at 586. The court explained that illegal possession of a vehicle should be treated differently from a mere breach of a rental contract. *Id.* at 587.

As the Fourth Circuit acknowledged, the Sixth Circuit views the rental company's permission to drive a rental car as "but one of many factors to be considered," on a case-by-case basis, in determining whether a driver has a legitimate expectation of privacy in the car. App, *infra*, 15a (citing *Smith*). In *Smith* itself, the Sixth Circuit examined five factors before concluding that the driver's subjective expectation of privacy was reasonable: (1) the driver was licensed and was thus driving the car legally; (2) he provided officers with the rental agreement and "sufficient" information about the car; (3) he was married to the lessee; (4) he had received permission from her to drive the car; and (5) he had called the company himself to reserve the car and had paid for the car himself. 263 F.3d at 586-87.

4. The conflict on this issue is not only clear, deep, and thoroughly entrenched, it is also untenable. This Court has recognized the importance of establishing clear Fourth Amendment rules that are "readily understood by police." *Thornton* v. *United States*, 541 U.S. 615, 623 (2004). "A single, familiar standard is essential," this Court has said, because police "have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979).

The present conflict does just the opposite: In some states, officers will know whether a search would be valid only if they can successfully predict whether any prosecution would take place in state or federal court. Federal and state law enforcement officers in New Mexico, for instance, must decide whether to obey the state supreme court's rule that unauthorized drivers enjoy an expectation of privacy or the Tenth Circuit's contrary rule. Compare *Van Dang*, 120 P.3d at 834, with *Roper*, 918 F.2d at 887-88. This choice presents particular difficulties in joint federal-state criminal investigations where law enforcement officers know from the start that prosecutions could occur in either court system. As the Commonwealth of Virginia recently argued before this Court, disagreements between state and federal circuit courts as to what triggers the Fourth Amendment's protections present practical difficulties for law enforcement. Petition for Writ of Certiorari at 13, *Virginia* v. *Moore*, No. 06-1082 (Feb. 1, 2007).

The conflict is also untenable for interstate drivers subject to arbitrary fluctuations in their

Fourth Amendment rights. As of now, the reasonableness of an unlisted driver's expectation of privacy varies significantly from place to place. An unauthorized driver entering the Tenth Circuit from any one of the nine adjoining states, for example, will suddenly lose the Fourth Amendment protection he enjoyed when he began his trip. These variations conflict with this Court's admonition that the "search and seizure protection of the Fourth Amendment" should not "vary from place to place and time to time." *Whren* v. *United States*, 517 U.S. 806, 815 (1996). To offer clarity both to interstate travelers and state law enforcement, this Court's review is necessary.

B. The Fourth Circuit's Rule Overlooks Everyday Expectations of Privacy

The Fourth Circuit's rule that "an unauthorized driver of a rental vehicle has no legitimate privacy interest in the vehicle," App., *infra*, 13a, is wrong. This Court has repeatedly stressed the importance of "the everyday expectations of privacy that we all share" in defining reasonableness under the Fourth Amendment. *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990). Instead of focusing on what "society is prepared to recognize as 'reasonable,'" *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), however, the Fourth Circuit's approach threatens to reduce Fourth Amendment jurisprudence to a species of contract law.

Allowing the terms of a standard-form contract to determine the reasonableness of a driver's privacy expectation ignores *Rakas*'s admonition that "arcane distinctions developed in property and tort law * * * ought not to control" Fourth Amendment rights. 439

U.S. at 143. Although "th[is] Court has not *altogether* abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment," *id.* at 143 n.12 (emphasis added), its decision in *Rakas* relied far more heavily on informal social notions of "dominion," "control," and the right to exclude, *id.* at 148-49.

The Court thus distinguished *Rakas*, in which the passengers had "neither a property nor a possessory interest in the automobile," from cases involving possessory interests grounded in social understandings. *Rakas*, 439 U.S. at 148-149. It reiterated that callers in public phone booths and social guests have no legal interest in the premises—which they "neither own[] nor lease[]," *id.* at 140—but have reasonable expectations of privacy because they control the area and can "exclude all others" except for the owner, *id.* at 149 (citing *Katz*, 389 U.S. 347; *Jones* v. *United States*, 362 U.S. 257 (1960)); see also *Olson*, 495 U.S. at 99 ("[G]uests * * * are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.").

The driver of a borrowed car, no matter his contractual rights, has a reasonable expectation of privacy in the car for the same reasons. Cf. *Rakas*, 439 U.S. at 154 (Powell, J., concurring) (distinguishing "between the Fourth Amendment rights of passengers and the rights of an individual who has exclusive control of an automobile."). Just as the overnight guest in *Jones* "had permission to use the apartment of his friend," "had a key to the

apartment," and "kept possessions in [it]," *Rakas*, 439 U.S. at 149 (citing *Jones*), Mincey had the renter's permission, used a key, and kept possessions in the rental car. Mincey also exercised near-exclusive dominion and control over the car because his girlfriend rented it specifically for his use. Cf. *Smith*, 263 F.3d at 586 ("Smith had an intimate relationship with Tracy Smith, the authorized driver of the vehicle who gave him permission to drive it.").

Moreover, that Mincey lacked the owner's permission to drive the rental car did not make his possession "wrongful" as this Court has defined that term. See *Rakas*, 439 U.S. at 141 n.9, 143 n.12; *Jones*, 362 U.S. at 267. *Rakas* defined "wrongful" using examples involving criminal trespasses, not breaches of private law. 439 U.S. at 141 n.9 (stolen car); *id.* at 143 n.12 (burglarized house). By contrast, driving a rental car with the renter's, but not the rental company's, permission, is no crime. *E.g.*, *Smith*, 263 F.3d at 587; *United States* v. *Cooper*, 133 F.3d 1394, 1402 (11th Cir. 1998); cf. *United States* v. *McClendon*, 86 Fed. Appx. 92, 95 (6th Cir. 2004) (unpublished) (holding that a tenant's "violation of her lease in subletting [a] bedroom * * * did not deprive [her sublessee] of a reasonable expectation of privacy.").

More fundamentally, a rental contract is not a useful proxy for what "society is prepared to accept as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In fact, a company's take-it-or-leave-it contract might prohibit certain conduct partly *because* society endorses it. Instead of reflecting common social expectations, for example, contractual requirements that every rental car driver be "authorized" more accurately represent the

industry's efforts to limit its insurance exposure and to extract additional rents from customers.[3]

Precisely because rental contracts are not proxies for social norms, making them dispositive of the reasonableness of a driver's privacy expectation would yield absurd results. Those contracts often purport to extinguish a driver's right to operate the car upon *any* breach of the contract's terms. *E.g.*, Budget Fastbreak Service Terms and Conditions ¶ 8 (effective Jan. 15, 2009), http://www.budget.com/budgetWeb/html/en/profile/master_printable.html ("We may repossess the car anytime it is found illegally parked, being used to violate the law or this Agreement, or appears to be abandoned."); *State* v. *$129,970,000*, 161 P.3d 816, 821 (Mont. 2007) (quoting similar language from an Avis contract). Budget's standard contract, for instance, terminates a rental agreement whenever the vehicle is used: "1) by anyone other than an authorized driver[;] * * * 2) to carry passengers or property for hire[;] 4) on unpaved roads; * * * [or] 7) recklessly or while overloaded." *Ibid.*

Consequently, if "an unauthorized driver of a rental vehicle has no legitimate privacy interest"

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[3] See, *e.g.*, Federal Trade Commission, FTC Facts for Consumers, *Renting A Car* (Feb. 2003), at http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut07.pdf (cautioning consumers about "additional-driver fees"); Irvin E. Schermer & William Schermer, 1 *Automobile Liability Insurance* § 6:18 (4th ed. 2008) (explaining that car rental companies rely on unlisted-driver prohibitions "as a basis for negating the omnibus coverage which otherwise would have been available to the lessee or his forbidden permittees," and noting that "a substantial number of courts" have rejected that method of limiting the industry's insurance exposure).

merely because he "does not have permission of the rental company," App., *infra*, 13a, then a great many authorized drivers may lack reasonable expectations of privacy as well. Taken to its logical conclusion, the Fourth Circuit's reasoning would allow a contract *alone* to extinguish a renter's permission to drive a rental car, and thus his reasonable expectation of privacy in it, the moment he lends the car to a friend, drives on an unpaved road, or even "tow[s] or push[es] anything." Budget Fastbreak Service Terms and Conditions, *supra*, ¶ 9.

This rule would "give[] police limitless discretion to conduct exploratory searches," *Arizona* v. *Gant*, 129 S. Ct. 1710, 1720 n.5 (2009), whenever they perceive a breach of a rental agreement. By precluding many rental car drivers from objecting to police searches, that rule would "create[] a serious and recurring threat to the privacy of countless individuals." *Id.* at 1720. The court of appeals' reasoning thus implicates what this Court recently called "the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Ibid.*

The logic of the Fourth Circuit's rule ignores the distinction between expectations of privacy that society is prepared to accept as reasonable, on one hand, and conduct that the car rental industry is prepared to endorse, on the other. But renters surely and reasonably expect their constitutional privacy interests to be more enduring than perfect compliance with standard-form contracts. A more faithful approach to the Fourth Amendment looks beyond the four corners of a rental agreement.

II. The Fourth Circuit's Holding That a Car Rental Company May Immediately Extinguish a Driver's Reasonable Expectation of Privacy by Instructing the Police Not to Release the Car to Him Also Deepens a Split Among the Lower Courts and Is Seriously Flawed

Purporting to provide an alternative basis for its decision, the Fourth Circuit held that a driver's subjective expectation of privacy in a rental car is not reasonable if, *after* the police have stopped the car, the rental company instructs officers that the car is "not to be released" to its driver. App., *infra*, 14a n.9. That holding conflicts with the rule followed in the Eleventh Circuit and cannot be correct.

One state court of last resort has taken the Fourth Circuit's position. The Montana Supreme Court has held that a renter immediately loses his reasonable expectations of privacy when the rental company, upon learning that he has breached his contract, instructs the police to impound the vehicle. *State* v. *$129,970,000*, 161 P.3d 816, 821 (Mont. 2007). That decision, like the decision below, reasons that the rental company's unilateral decision not to release the car back to the driver—even if triggered by a police phone call after a stop—immediately nullifies the driver's expectation of privacy.

In contrast, the Eleventh Circuit has held that while a rental company's "repossession *prior to* the presence of law enforcement" might extinguish a driver's expectation of privacy, repossession *after* the police stop the driver and call the rental company does not. *Cooper*, 133 F.3d at 1401 (emphasis added). Fourth Amendment protections, it reasoned, should not turn on "the rental company's dormant right of

repossession" triggered by a police phone call. *Ibid.* Accordingly, the court ruled that a driver of an overdue rental car had a reasonable expectation of privacy in the car because the rental company had not "attempt[ed] to enforce any of its contractual or legal rights at any time prior to the [police's] phone call." *Ibid.*; see also *United States* v. *Kelly*, 414 F. Supp. 1131, 1146 (W.D. Mo. 1976), *rev'd on other grounds*, 547 F.2d 92 (8th Cir. 1977) ("[T]he automobile had not been repossessed by the rental agency at the time of defendant's arrest, and therefore defendant had a reasonable expectation of privacy with respect to the interior of the automobile.").

The Eleventh Circuit's view is certainly correct. An *expectation* of privacy is necessarily forward-looking; it cannot be negated after the police get involved. Cf. *Stoner* v. *California*, 376 U.S. 483, 490 (1964) (holding that a hotel guest's protection against unreasonable searches "would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel" to grant a police request to search the guest's room); *Chapman* v. *United States*, 365 U.S. 610, 617 (1961) (explaining that upholding a search based on a landlord's decision to invite officers into leased premises "'would reduce the (Fourth) Amendment to a nullity and leave (tenants') homes secure only in the discretion of (landlords).'" (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948))); *State* v. *Thomale*, 317 N.W.2d 147, 149 (S.D. 1982) (holding that an unlisted driver lacked a legitimate expectation of privacy in a rental car, where, three days before the police searched the car, the rental company sent a letter to the renter terminating his lease). The Fourth Circuit and the

Montana Supreme Court, however, take the opposite view. They hold that a telephone call made during a traffic stop can transform a driver's reasonable expectation of privacy into an unreasonable one—which is tantamount to holding that the driver's expectation was illusory from the start.

That might explain why the Fourth Circuit relegated its alternative rationale to a footnote: it represents no alternative at all. The only difference between it and the court's primary holding is that the police must, before beginning a search, first call and obtain the rental company's instruction not to release the car. As this case demonstrates, the police typically make those calls, and rental companies typically give the desired instruction. See 6/6/06 Tr. 91-92 (officer's testimony about the practice of obtaining consent from car rental companies to impound cars driven by unlisted drivers).[4]

While a car rental company might in some case decline to give that instruction, the general practice in favor of giving it could undermine the security of all drivers—authorized and unauthorized alike. A driver's protection from an unreasonable search would depend completely on the whim, discretion, or business judgment of the rental company, not on Fourth Amendment considerations. Under the Eleventh Circuit's rule, by contrast, drivers have meaningful Fourth Amendment protection that does not evaporate during a traffic stop.

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[4] For other references to this police practice and the industry's typical response, see *United States* v. *Worthon*, 520 F.3d 1173, 1177 (10th Cir. 2008); *United States* v. *Eden*, 190 Fed. Appx. 416, 417 (6th Cir. 2006) (unpublished); *People* v. *Edmunds*, No. 237579, 2003 WL 1387138, *1 (Mich. Ct. App. Mar. 18, 2003) (per curiam).

III. The Questions Presented Here Are Recurring And Important, And This Is An Ideal Case In Which To Address Them

Whether an unlisted driver lacks a reasonable expectation of privacy in a rental car—either automatically or due to the rental company's request, after a police phone call, that the police not release the vehicle to the driver—is a recurring and important issue. Under the Fourth Circuit's approach, Fourth Amendment protections are nonexistent whenever someone drives a rental car with the renter's, but not the owner's, permission. This is a common occurrence, given that there are nearly two million rental cars in the United States at any given time.[5]

Indeed, use of a rental car by an unlisted driver is "[i]n the very nature of modern automobile use." *Roth* v. *Old Republic Ins. Co.*, 269 So. 2d 3, 6-7 (Fla. 1972). The likelihood that an unauthorized driver will take the wheel of a rental car is both "foreseeable," *id.*, and "exceedingly great," *Motor Vehicle Acc. Indemn. Corp.* v. *Continental Nat. Am. Group Co.*, 35 N.Y.2d 260, 264-265 (1974). In fact, "[t]he parking or garaging of these rental vehicles often *requires* the lessee to give a hotel, restaurant, or other valet permission to operate the vehicle." *Enterprise Leasing Co.* v. *Allstate Ins. Co.*, 671 A.2d 509, 514-15 (Md. 1996) (emphasis added).

It is therefore unsurprising that, beyond the cases constituting the federal and state splits, courts face myriad cases involving this issue. In fact, the

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[5] See Auto Rental News, 2008 U.S. Car Rental Market, http://www.autorentalnews.com/t_inside.cfm?action=statistics, last visited May 17, 2009.

Fourth Circuit has reached this issue twice in the last six months. App. *infra*, 11a – 15a; *Luster*, 2009 WL 1178527; see also *State* v. *Henderson*, No. 07COA031, 2008 WL 4408594, *3, 4 (Ohio Ct. App. Sept. 26, 2008); *United States* v. *Kennedy*, No. 06-23, 2007 WL 1740747, *4 (E.D. Pa. June 15, 2007); *State* v. *Cutler*, 159 P.3d 909, 912 (Idaho Ct. App. 2007); *Commonwealth* v. *Jones*, 874 A.2d 108, 120 (Pa. Super. Ct. 2005); *State* v. *Webber*, No. 90,899, 105 P.3d 279, 2005 WL 283585, *4 (Kan. Ct. App. 2005) (Table); *State* v. *Hill*, 94 P.3d 752, 758 (Mont. 2004); *Littlepage* v. *State*, 863 S.W.2d 276, 279-80 (Ark. 1993); *Thomale*, 317 N.W.2d at 149. These cases show extreme confusion and inconsistency in the lower courts. Compare *United States* v. *Little*, 945 F. Supp. 79, 83, 83 n.2 (S.D.N.Y. 1996) (renter's permission does create a reasonable expectation of privacy), with *United States* v. *Taddeo*, 724 F. Supp. 81, 83-84 (W.D.N.Y. 1989) (no expectation of privacy even with the renter's permission). The pervasive confusion over this important and recurring issue of constitutional law calls for this Court's guidance. See *Colorado* v. *Bertine*, 479 U.S. 367, 370 (1987) ("We granted certiorari to consider [an] important and recurring question of [Fourth Amendment] law * * * .").

Moreover, this petition presents both questions in a manner particularly well-suited for this Court's review. If this Court decides the first question presented here—whether Mincey had a legitimate expectation of privacy in the rental car—in his favor, it can then consider the next logical question: whether the police can defeat that expectation simply by calling the rental company and obtaining an instruction not to release the car.

If, by contrast, this Court were to consider, in some other case, only the first question presented here, the Court would (if the issue were decided in the driver's favor) quickly face the prospect of having to decide, in yet another case, the second question. Moreover, a ruling that unlisted drivers have privacy interests in rental cars would have little practical effect unless the Court also rules that those privacy interests survive the routine phone calls in which rental companies instruct police officers not to release the rental cars they have stopped. The logical interconnection of both questions argues strongly for review in a single case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2009

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 07-4563

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TOMMY ZEKE MINCEY,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Richard L. Voorhees, District Judge. (5:05-cr-00252)

Argued: September 23, 2008
Entered: November 24, 2008

Before NIEMEYER, Circuit Judge, HAMILTON, Senior Circuit Judge, and T. S. ELLIS, III, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Senior Judge Ellis wrote the opinion, in which Judge Niemeyer and Senior Judge Hamilton joined.

ARGUED: Kevin Andre Tate, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. Amy

Elizabeth Ray, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee. **ON BRIEF:** Claire J. Rauscher, Executive Director, Emily Marroquin, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. Gretchen C. F. Shappert, United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

ELLIS, Senior District Judge:

Appellant, Tommy Zeke Mincey ("Mincey"), appeals his conviction by a jury for possession with intent to distribute at least 100 grams of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. At issue in this appeal are the following questions:

(i) whether appellant, as an unauthorized driver of a rental vehicle, had a legitimate expectation of privacy in the rental vehicle, thus entitling him to contest a warrantless search of the vehicle on Fourth Amendment grounds,

(ii) whether verbal consent of the rental company provided an independent basis for the warrantless search of the vehicle,

(iii) whether the scope and duration of the vehicle stop satisfied Fourth Amendment constitutional standards, and

(iv) whether the trial court abused its discretion in admitting into evidence alleged drug courier profile evidence.

For the reasons that follow, we affirm.

I.

The trial record reflects that at approximately 1:33 p.m. on October 3, 2005, Sergeant Randy Cass with the Iredell County Sheriff's Office stopped a 2000 Dodge four-door automobile with Georgia plates traveling south on Interstate 77 near Statesville, North Carolina. Sergeant Cass effected the stop because he observed the Dodge following the car ahead of it too closely, a violation of North Carolina traffic law. Once both vehicles were stopped on the side of the road, Sergeant Cass exited his police vehicle, walked toward the passenger side of the stopped vehicle, activated his microphone, and then asked the vehicle's driver and sole occupant -- Mincey -- for his driver's license. Mincey produced a Michigan driver's license in the name of Kenyatta Anthony James containing a photo that matched Mincey's physical appearance. Sergeant Cass advised Mincey why he had been stopped and then asked for the vehicle's registration. In response, Mincey produced a rental agreement from the Armada Rental Company, advising Sergeant Cass that the vehicle had been rented by his girlfriend in Georgia and that her name was on the rental agreement.

While Mincey was locating the rental agreement, Sergeant Cass asked him where he was traveling to on that occasion. Mincey responded that he was driving back to Atlanta, Georgia from Newark, New Jersey, where he had been visiting a family member. Mincey further stated that he had recently moved from Michigan to Dunwoody, Georgia and he provided Sergeant Cass with his new Georgia

address for use in Sergeant Cass's issuance of a citation. During this initial exchange, Sergeant Cass observed a cell phone in the passenger seat of the rental vehicle, as well as two open containers of energy drinks in the front cup holders. He also recognized, based on his experience and training, that Mincey's reported travel destinations -- Newark and Atlanta -- were known "source cities" for illegal drugs.

At approximately 1:38 p.m., Sergeant Cass returned to his police vehicle with the driver's license and rental agreement that had been provided by Mincey, intending to verify the information provided to him and then to issue Mincey a warning citation for following the car ahead of him too closely. Although writing such a citation would typically take Sergeant Cass approximately five minutes, the stop required additional time in this instance because Sergeant Cass was unable to verify the validity of Mincey's Michigan driver's license through the law enforcement communications system, a standard step in the citation process. Specifically, Sergeant Cass first attempted to verify Mincey's license using the listed driver's license number, which the system revealed was not on file. Sergeant Cass then performed a search using the name on the driver's license -- Kenyatta Anthony James. Again, the system disclosed no Michigan driver's license in that name. Sergeant Cass also ran a search for the rental vehicle's Georgia license plates and confirmed that they were indeed registered to the vehicle in question; this check also confirmed that the vehicle was owned by the Armada Rental Company. In the meantime, while performing these information checks, Sergeant Cass began

writing the warning citation using the driver's license and residence information that Mincey had provided.

At approximately 1:50 p.m., Sergeant Cass called the Armada Rental Company and spoke with a woman named Chris to explain the situation, namely that he had stopped one of the company's rental vehicles on the highway for a traffic violation and that the driver and only occupant of the vehicle did not appear to be an authorized driver under the rental agreement. Sergeant Cass confirmed with Chris that Mincey was an unauthorized driver under the rental agreement, which Chris was able to review on the company's computer system. Sergeant Cass then asked Chris for consent to search the vehicle. In response, Chris advised that she would need to speak with a manager and that someone from the rental agency would need to call him back. Sergeant Cass then gave Chris his cell phone number.

At approximately 1:55 p.m., an additional officer -- Sergeant Elliott -- arrived at the scene.[1] At this point, Sergeant Cass turned his microphone off in order to update Sergeant Elliott on his efforts to confirm the authenticity of the Michigan driver's license as well as Mincey's status as an unauthorized driver of the rental vehicle. At around this time, and while Sergeant Cass's microphone was off, another woman from the rental company, Kari Peabody, called Sergeant Cass on his cell phone. During the course of this conversation, Peabody instructed Sergeant Cass that the rental vehicle could not be

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[1] A third officer, Sergeant Byrd, arrived shortly thereafter.

released to Mincey, since he was an unauthorized driver under the rental agreement. (J.A. 79). Peabody further advised that the officers had permission to impound the vehicle or "to do whatever [they] needed to do." (J.A. 128). Sergeant Cass also asked Peabody if he could search the vehicle. According to Sergeant Cass's uncontradicted testimony, Peabody put the phone down briefly, apparently spoke with someone else at the rental company, then advised Sergeant Cass, "yes, go ahead." (J.A. 129).[2]

At approximately 2:01 p.m., Sergeant Cass exited his police vehicle and walked back to the passenger side of the rental vehicle. He reactivated his microphone and asked Mincey to step outside of the rental vehicle so that he could explain the situation to him. Sergeant Cass then returned the Michigan driver's license to Mincey and handed him the warning citation, which Sergeant Cass had issued using the name on the Michigan driver's license and the Georgia address Mincey had provided. Sergeant Cass then showed Mincey the rental agreement and told him that he had spoken on the telephone with the rental company. Specifically, Sergeant Cass

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[2] Sergeant Cass testified both during the suppression hearing and in the course of the trial that Peabody gave him verbal consent to search the rental vehicle. Peabody, in contrast, who testified only at the suppression hearing, stated only that she did not recall giving Sergeant Cass permission to search the car during the course of their telephone conversation. She also was not able to recall any specifics of what she told Sergeant Cass to do with the rental vehicle. In the circumstances, the district court found Sergeant Cass's uncontradicted testimony to be credible and thus found that the rental company had verbally consented to the search of the vehicle. (J.A. 246-47).

advised Mincey that the vehicle could not be released to his possession because he was not an authorized driver under the rental agreement. In light of this, Sergeant Cass also offered to drive Mincey to the next exit on the highway. Sergeant Cass then told Mincey that he and the other officers were going to search the vehicle and asked Mincey for consent to pat him down for weapons. Mincey consented to the pat down, which revealed a cell phone in his pants pocket.

At approximately 2:03 p.m., Sergeant Cass motioned for Sergeants Elliott and Byrd to assist him with the search of the vehicle. At this point, Mincey asked for permission to return to the vehicle to retrieve a cell phone to call his girlfriend, the authorized driver of the rental vehicle.[3] Sergeant Cass declined to permit Mincey to return to the vehicle, reminding Mincey that he already had a cell phone in his pocket. Sergeant Elliott then pulled the rental vehicle further off the road for safety purposes and the search began immediately thereafter.

Several minutes into the search, at approximately 2:07 p.m., Sergeant Cass pulled up

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[3] Janelle Crosby, Mincey's purported girlfriend and the authorized driver of the rental vehicle, testified in the course of the suppression hearing that she had rented the vehicle for Mincey because he did not have a credit card to secure the rental. She further testified that she gave Mincey permission to drive the vehicle. Yet, on the rental agreement, when asked to identify the name, age and driver's license number for any additional individuals who would be driving the vehicle, Crosby wrote the word "None," and signed her initials. (J.A. 41). The rental agreement expressly provided that the vehicle was not to be used "by any person not specified [in the agreement]" or "in violation of any law, ordinance or regulation." Id.

the console around the vehicle's gearshift, a common site for concealing contraband, and there discovered a plastic bag containing what appeared to him to be illegal drugs. The package had been vacuum-sealed and wrapped in fabric softener sheets and was later confirmed to contain approximately 140 grams of high purity heroin. The search of the interior of the vehicle also revealed (i) three cell phones, in addition to the one located in Mincey's pocket, one of which was an untraceable "boost" phone, (ii) several cell phone chargers, and (iii) MapQuest driving directions from Atlanta, Georgia to Newark, New Jersey that had been printed on October 1, 2005, two days prior to the traffic stop, listing an estimated driving time of nearly 14 hours. Also found in the vehicle's trunk were a pair of bolt cutters and a duffel bag containing clothes and toiletries.

Immediately following discovery of the suspected contraband, Mincey was ordered to the ground and arrested. He was then transported to the narcotics office of the police department.[4] During an initial post-arrest interview with Detective Lieutenant David Ramsey, Mincey continued to identify himself as Kenyatta Anthony James, claiming that the Michigan driver's license was valid and contained his correct name and date of birth. Yet, when further questioned, he twice gave Detective Ramsey an age inconsistent with the date of birth listed on the driver's license.

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[4] Following Mincey's arrest, Sergeant Cass contacted another officer, who then arrived at the scene and drove the rental vehicle to the police station. Thereafter, at approximately 2:38 p.m., Sergeant Cass spoke with a store manager from the rental company and advised him that the rental vehicle was ready and available for pickup at the station.

Later, in the course of subsequent questioning by Sergeant Elliott, Mincey finally identified himself, for the first time, as Tommy Mincey; he also reported a birth date different from the date appearing on the Michigan driver's license.[5] Then, in a voluntary statement to Sergeant Elliott,[6] Mincey provided an explanation for his lengthy travel between Atlanta to Newark and denied any knowledge of the heroin found inside the rental vehicle. In this regard, Mincey stated that on October 2, 2005, he met a Puerto Rican male named "Charles" at the 112 Strip Club in Atlanta. Charles allegedly asked Mincey if he wanted to make some money, and Mincey responded that he did. Mincey then met with Charles across the street from the 112 Strip Club at a bus station, where they allegedly negotiated a price of $5,000 for Mincey to drive Charles from Atlanta to New Jersey. Mincey claimed no further details were discussed about the trip at that time.

According to Mincey, he and Charles left Atlanta in the rental vehicle at approximately 12:00 p.m. on October 2, 2005. Mincey and Charles each drove half the drive to New Jersey and they ultimately arrived at the Cinderella Strip Club in Newark at approximately 1:00 a.m. on October 3, 2005. They

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[5] Law enforcement officers eventually confirmed that the Michigan driver's license Mincey presented in the course of the traffic stop was fraudulent.

[6] Prior to accepting this voluntary statement, Sergeant Elliott read Mincey his Miranda rights, in the presence of Sergeant Cass, and Mincey then knowingly and voluntarily waived those rights in a written waiver form. (J.A. 481). See Miranda v. Arizona, 384 U.S. 436 (1966). Mincey does not dispute the voluntariness of either his statement or the waiver of his Miranda rights in this instance.

entered the club and were inside for approximately 30 minutes, when Charles asked Mincey for the keys to the vehicle. Charles then went outside with the keys and Mincey remained inside the club. Later, when the club closed, Mincey went outside and observed Charles inside a black Mercedes Benz. Charles then told Mincey to drive the rental vehicle back to Atlanta by himself and that he would "settle up" with Mincey on Tuesday at the 112 Strip Club in Atlanta. (J.A. 490). According to Mincey, no further details were discussed. Mincey thus began the drive back to Atlanta at approximately 4:30 a.m. on October 3, 2005, and later that day he was stopped by Sergeant Cass in North Carolina. Mincey claimed he did not know how the heroin got inside the rental vehicle and that he never had any discussions with Charles about illegal drugs. Yet, he did admit to Sergeant Elliott that the four cell phones found on his person and in the rental vehicle on October 3, 2005, all belonged to him.

On October 25, 2005, Mincey was charged in a one-count indictment with possession with intent to distribute at least 100 grams of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. Mincey filed a motion to suppress the evidence resulting from the October 3, 2005 search of the rental vehicle, arguing that the extended vehicle stop and warrantless search violated his Fourth Amendment rights in various respects. On June 6, 2006, following two days of testimony, the district court denied Mincey's motion to suppress, concluding (i) that the initial traffic stop was valid in that it resulted from a violation of North Carolina traffic laws, (ii) that the length and scope of the investigatory detention was reasonable in the

circumstances, (iii) that Mincey did not have standing to contest the warrantless search as an unauthorized driver of the rental vehicle, and (iv) that the rental company consented to the search in any event. (J.A. 246).

On July 12, 2006, following a two-day jury trial, Mincey was convicted as charged, with one count of possession with intent to distribute at least 100 grams of heroin. Mincey was subsequently sentenced on this offense to 150 months imprisonment, to be followed by 8 years of supervised release, with a final Judgment being entered on June 1, 2007. Mincey then filed a timely notice of appeal raising essentially four issues, each of which is addressed here.

II.

Mincey's first three arguments on appeal concern the district court's denial of his motion to suppress. On appeal, we review legal conclusions underlying the denial of a motion to suppress de novo, and factual findings for clear error. United States v. Moreland, 437 F.3d 424, 429 (4th Cir. 2006) (citing United States v. Johnson, 114 F.3d 435, 439 (4th Cir. 1997)). In this context, "[w]e construe the evidence in the light most favorable to the Government, the prevailing party below." United States v. Seidman, 156 F.3d 542, 547 (4th Cir. 1998) (citations omitted).

A.

Mincey first argues that the district court erred in holding that he, as an unauthorized driver under the rental contract, did not have standing to contest

the warrantless search of the rental vehicle.[7] As to this issue, it is well settled that only where a search intrudes upon a space as to which an individual has "a legitimate expectation of privacy" may the individual contest the search on Fourth Amendment grounds. United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978)). And, the question whether an expectation of privacy is "legitimate" requires a two-prong test, namely (i) whether the individual had a subjective expectation of privacy in the area searched, and (ii) whether that subjective expectation of privacy is objectively reasonable based on "concepts of real or personal property law" or "understandings that are recognized and permitted by society." Rakas, 439 U.S. at 143, n.12. Although common law concepts of real and personal property are not dispositive of this issue, it is important to note that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." Id.

Here, Mincey's subjective expectation of privacy in the rental vehicle is not in dispute. Rather, the only question presented is whether his subjective expectation of privacy was objectively reasonable, thus rendering it "legitimate" and entitled to Fourth Amendment protection. As to this issue, our previous decision in Wellons is squarely on point. There, we

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[7] Although courts continue to use the generic term "standing" in this context, it is clear that the proper legal inquiry is whether the individual at issue had a "legitimate expectation of privacy" in the area searched, as discussed infra. United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (citation omitted).

held definitively that an unauthorized driver of a rental vehicle has no legitimate privacy interest in the vehicle and therefore cannot contest a warrantless search of the vehicle on Fourth Amendment grounds. See Wellons, 32 F.3d at 119 (citations omitted). We further held in Wellons that this conclusion was not altered where, as here, the authorized lessee allows the unauthorized driver to drive the rental vehicle, as an unauthorized driver still does not have permission of the rental company, the owner of the vehicle. Id. at 119 n.2.

Mincey readily acknowledges application of Wellons to the facts presented here, but nonetheless urges us to reconsider Wellons in light of the analyses adopted by several other circuits with respect to the unauthorized rental driver issue. Yet, a review of the applicable case law reveals no persuasive reason to overturn or alter the Wellons holding in this instance.

In this regard, the Fifth, Tenth and Eleventh Circuits appear to be in accord with this circuit in holding that an unauthorized driver of a rental vehicle does not have a legitimate privacy interest in that vehicle for purposes of the Fourth Amendment, regardless of whether the unauthorized driver has the authorized renter's permission to drive the vehicle. See United States v. Riazco, 91 F.3d 752 (5th Cir. 1996); United States v. Roper, 918 F.2d 885 (10th Cir. 1990); United States v. Boruff, 909 F.2d 111 (5th Cir. 1990);[8] United States v. Obregon, 748

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[8] Mincey cites the Fifth Circuit's decision in United States v. Kye Soo Lee, 898 F.2d 1034 (5th Cir. 1990), as reaching a different result. Interestingly, Boruff and Lee were decided in the same year, although Boruff is the later published

F.2d 1371 (10th Cir. 1984); United States v. McCulley, 673 F.2d 346 (11th Cir. 1982). The Eighth and Ninth Circuits take a different approach, holding generally that an unauthorized driver of a rental vehicle may have a legitimate expectation of privacy in the vehicle for Fourth Amendment purposes if he is able to establish that the authorized renter/driver gave him permission to drive the vehicle, as involved here. See United States v. Muhammad, 58 F.3d 353 (8th Cir. 1995); United States v. Best, 135 F.3d 1223 (8th Cir. 1998); United States v. Thomas, 447 F.3d 1191 (9th Cir. 2006).[9] And finally, the Sixth Circuit has adopted a totality of the circumstances analysis on the issue, holding

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opinion. The Fifth Circuit has subsequently noted the apparent conflict between Boruff and Lee, making clear that the holding in Boruff is the general rule followed in the Fifth Circuit. See United States v. Seeley, 331 F.3d 471, 472 n.1 (5th Cir. 2003). In any event, Lee is at least distinguishable in its reasoning in that it does not even address the fact that the hired rental truck drivers in that case were not listed as authorized drivers on the subject rental agreement, analogizing the case instead to one where an individual borrows a personal vehicle from another with the other's consent.

[9] Although not necessary to the result reached here, it should nonetheless be noted that this line of cases is factually distinguishable from the case at bar. Indeed, even assuming Mincey had the permission of the authorized renter to drive the rental vehicle in this instance, any such permission clearly terminated once the rental company affirmatively advised Sergeant Cass that Mincey, as an unauthorized driver under the rental contract, was not entitled to possess the vehicle and that the vehicle was not to be released to Mincey at the scene of the traffic stop. In other words, at that moment, any permission that had previously been extended to Mincey by the authorized driver of the rental vehicle was effectively extinguished by the rental company, the actual owner of the vehicle and issuer of the subject rental contract.

that permission of the lessee to drive a rental vehicle is but one of many factors to be considered in determining whether an unauthorized driver has a legitimate privacy interest in a rental vehicle. United States v. Smith, 263 F.3d 571 (6th Cir. 2001).

While recognizing the varying approaches adopted elsewhere, Mincey's argument is appropriately rejected in this instance in light of Wellons.[10] Nor are we persuaded to depart from our prior precedent in any respect. Put simply, Mincey, as an unauthorized driver under the Armada rental contract, had no legitimate expectation of privacy in the rental vehicle and cannot contest the warrantless search of the vehicle on Fourth Amendment grounds. This is especially so where, as here, the rental company, on learning of the vehicle's unauthorized use, instructs that the vehicle is not to be released to the unauthorized driver.

B.

Mincey next argues that the district court erred in denying his motion to suppress on the alternative basis of consent for the search having been given by the rental company, arguing specifically that any consent by the agency did not provide an independent justification for the warrantless search when the vehicle had already been rented to a third party. In the circumstances, given that Mincey had no legitimate expectation of privacy in the rental vehicle at the time of the warrantless search, it is

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[10] We have previously reaffirmed our holding in Wellons in several unpublished decisions. See United States v. Rollack, 173 F.3d 853 (Table), 1999 WL 104806 (4th Cir. Mar. 1, 1999); United States v. Hannah, 168 F.3d 483 (Table), 1998 WL 911709 (4th Cir. Dec. 31, 1998).

unnecessary to reach or decide the issue of consent in this instance.

C.

Mincey next contends that the district court erred in denying his motion to suppress based on the length and scope of the traffic stop and the accompanying investigatory detention. In this regard, Mincey contends that he was detained and questioned by Sergeant Cass beyond the scope of the initial traffic stop without sufficient basis or a reasonable suspicion that he was involved in criminal activity, thus violating his Fourth Amendment rights. See Reid v. Georgia, 448 U.S. 438, 440 (1980).

Mincey is correct that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005). It is also clear that in order to detain a driver for investigative purposes beyond the issuance of a traffic citation or warning, an officer must possess "a reasonable and articulable suspicion that the person seized is engaged in criminal activity." Reid, 448 U.S. at 440 (citations omitted).[11] In evaluating whether an investigative detention is supported by reasonable suspicion in this regard, a reviewing court must consider the totality of the circumstances known to the investigating officer, including the

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[11] For purposes of the "reasonable suspicion" analysis, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard . . ." United States v. Arvizu, 534 U.S. 266, 274 (2002) (citation omitted).

"specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Terry v. Ohio, 392 U.S. 1, 27 (1968).

Here, it is unnecessary to reach the reasonable suspicion analysis, as the scope and duration of the vehicle stop were justified by the time and actions necessary for Sergeant Cass to verify the information contained in the driver's license and rental agreement provided to him by Mincey, a required step in the issuance of a valid citation. Indeed, the record reflects that no more than 35 minutes elapsed from the time Mincey was initially stopped until his ultimate arrest; this time included the search of the rental vehicle. A review of the law enforcement video and microphone recordings of the vehicle stop also confirms the reasonableness of the time and actions necessary for Sergeant Cass to verify Mincey's identity and unauthorized driver status in this instance.[12] In the circumstances, therefore, the scope and duration of the vehicle stop did not violate Mincey's Fourth Amendment rights and the district court did not err in denying Mincey's motion to suppress on this ground.[13]

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[12] As noted above, such actions included Sergeant Cass's unsuccessful efforts to verify Mincey's Michigan driver's license through the law enforcement communications system, first by number and then by name. Further time was consumed by Sergeant Cass's reasonable telephone communications with several representatives from the rental company (i) to confirm that Mincey was an unauthorized driver of the subject rental vehicle and (ii) to obtain the rental company's instructions with respect to the vehicle, including, inter alia, their consent to a warrantless search.

[13] Because we find that the duration of the traffic stop was reasonable, we do not need to reach the further issue of whether Sergeant Cass had "a reasonable and articulable

III.

Mincey's fourth and final argument on appeal is that the district court abused its discretion when it allowed alleged drug courier profile testimony to be admitted as evidence in the course of the jury trial. In this respect, we note that evidentiary rulings are generally reviewed for abuse of discretion. United States v. Queen, 132 F.3d 991, 995 (4th Cir. 1997) (citation omitted). Thus, a trial court's determination to admit evidence should not be disturbed on appeal unless the trial court has acted "arbitrarily or irrationally." United States v. Jones, 913 F.2d 174, 177 (4th Cir. 1990) (citing United States v. Masters, 622 F.3d 83, 87-88 (4th Cir. 1980)).

We have previously held that it is "clearly impermissible" for the government to attempt "to establish the defendant's guilt by showing that he has the same characteristics as a drug courier." Jones, 913 F.2d at 177. Put differently, "the use of expert testimony as substantive evidence showing that the defendant 'fits the profiles and, therefore, must have intended to distribute the . . . [drugs] in his possession' is error." Id. (quoting United States v. Quigley, 890 F.2d 1019 (8th Cir. 1989), cert. denied, 493 U.S. 1091 (1990)). We nonetheless recognized in Jones that drug courier profile evidence may still be used in appropriate circumstances, including, for example, "as purely background material to explain why the defendant was stopped...[or] to rebut

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suspicion" that appellant was engaged in criminal activity. Reid, 448 U.S. at 440. We note, however, that the facts presented here are sufficient to support such a finding, particularly with respect to Mincey's fraudulent use of a driver's license. Id.

testimony provided by a defendant who claims that he is not a typical drug courier." Jones, 913 F.2d at 177 (citing United States v. Sokolow, 490 U.S. 1 (1989), United States v. Beltran-Rios, 878 F.2d 1208 (9th Cir. 1989)).

Here, the alleged improper drug courier profile evidence pertained to Mincey's possession of four cell phones at the time of his arrest. Specifically, Mincey objects to the district court's admission of Sergeant Cass's testimony -- presented in the course of government counsel's re-direct examination -- that drug couriers typically carry multiple cell phones, particularly boost phones, to guarantee that they will have sufficient cellular coverage to stay in contact with the person for whom they are transporting drugs.[14]

While the disputed testimony may arguably be viewed as drug courier profile evidence, the record reflects that the testimony was elicited by government counsel in this instance as rebuttal evidence, consistent with our previous holding in Jones. 913 F.2d at 177. Indeed, in the course of cross-examination, Mincey's counsel asked Sergeant Cass, "Now, with respect to those cell phones, there's nothing illegal about having a cell phone, is there?",

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[14] In this regard, Sergeant Cass testified that

> [a] drug courier is going to have to keep in contact with the person that they're hauling drugs for. They will give them multiple phones to where they can guarantee they're going to have coverage. Anyone that's got a cell phone will know there's some places your phone won't pick up so they'll give them a different type of phone.

(J.A. 379-80). Sergeant Cass further testified that "boost phones have been prevalent" in many of the stops and seizures made by his office. (J.A. 380).

to which Sergeant Cass simply responded, "No, sir." (J.A. 373). A review of the trial transcript makes clear that the alleged drug courier profile evidence at issue was thereafter elicited by government counsel during its re-direct examination as a means to rebut Sergeant Cass's testimony regarding the legality of possessing multiple cell phones.[15] See Jones, 913 F.2d at 177 (recognizing that drug courier profile evidence may be used "to rebut testimony provided by a defendant who claims that he is not a typical drug courier").

In an attempt to avoid this result, Mincey argues that the single question posed to Sergeant Cass by Mincey's counsel on cross-examination regarding the legality of possessing multiple cell phones was necessary given the government's "protracted references [in the course of direct examination] to Mincey's possession of multiple cell phones as being indicia of his knowledge that drugs were in the rental vehicle." (Appellant Reply Br. 9). Yet, this argument is unpersuasive; a review of the trial transcript makes clear that Sergeant Cass's

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[15] Indeed, the contested testimony was prefaced by the following exchange between government counsel and Sergeant Cass:

> Q. Do you remember something to the effect [that] there's nothing illegal about having multiple cell phones?
>
> A. Yes, sir.
>
> Q. Based on your training and experience, is there a reason for somebody involved in drug activity . . . to have multiple cell phones?
>
> A. Yes, sir.
>
> Q. And based on your training and experience, what is the purpose of having multiple cell phones?

(J.A. 379).

testimony on direct examination pertaining to Mincey's four cell phones amounted to nothing more than an identification and general description of the various items discovered in the course of the vehicle search conducted in this case. Significantly, no drug courier profile evidence was elicited during the course of Sergeant Cass's testimony on direct examination. Thus, contrary to Mincey's contentions, the government, in its direct examination of Sergeant Cass, did not attempt "to establish the defendant's guilt by showing that he has the same characteristics as a drug courier." Jones, 913 F.2d at 177.

In the circumstances, given that Mincey's counsel opened the door to the contested testimony in the course of his cross-examination of Sergeant Cass, the alleged drug courier profile evidence elicited by the government in the course of its re-direct examination of Sergeant Cass is appropriately viewed as rebuttal evidence consistent with our holding in Jones. Id. The district court, therefore, neither abused its discretion nor acted "arbitrarily or irrationally" in admitting this testimony in the course of Mincey's trial. Jones, 913 F.2d at 177 (citation omitted).

IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

NORTH CAROLINA IN
THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
COUNTY OF IREDELL 5:05-cr-00252-1

UNITED STATES OF AMERICA,

Plaintiff,

VS. :

TOMMY ZEKE MINCEY,

Defendant.

HEARING BEFORE HONORABLE JUDGE
RICHARD VOORHEES
Charlotte, North Carolina
June 6, 2006

Reported by: Nancy A. Lombardi
Court Reporter
Notary Public

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Hearing before the Honorable
Judge Richard Voorhees

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and the Fourth Circuit precedent, and also the sanctions defense counsel has been attempting to argue by putting on Miss Crosby. There is an unpublished decision by the Fourth Circuit, and even with the prior decision, that does not make a difference under the facts in the case and the law in this circuit.

THE COURT: Okay. The motion to suppress will be denied. Traffic stop was valid in the sense that it resulted from a violation of North Carolina traffic law for which a warning citation was issued. The length and scope of the investigatory detention was reasonable in light of the factors which the officers have testified to.

Defendant had no standing to contest the search and seizure of the rental car. The rental car agency gave permission for the search of the vehicle. The fact that Ms. Crosby may have reported to let the defendant have the car and testified that she did does not change the analysis.

Thank you very much.

MR. TATE: Your Honor, one point that I wish, just so it's on the record. I did hear the Court say that — conclude that Mr. Mincey did not have standing; is that right?

THE COURT: That's right.

MR. TATE: And I think I heard, because I think it's going to be a clearer analysis, the Court said that the rental car company authorized the search. That is in contradiction to the testimony of Miss Peabody who testified previously that she did not –

THE COURT: Okay. The record will speak for itself on that point, and my notes indicate that she didn't recall saying a search was authorized by Armada. Whereas, if I'm not mistaken, the officer testified that she did authorize him to do the search, and that was credible testimony. That's my recollection of the evidence not having a copy of the transcript to review at this point.

MR. TATE: Thank you.

THE COURT: Thank you.

***

Entered: December 22, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-4563

UNITED STATES OF AMERICA,
Plaintiff – Appellee

v.

TOMMY ZEKE MINCEY,
Defendant – Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Senior Judge Hamilton, and Judge Ellis.

For the Court

/s/ Patricia S. Connor, Clerk

OPPOSITION BRIEF

(3)

No. 08-1482

In the Supreme Court of the United States

TOMMY ZEKE MINCEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner had a reasonable expectation of privacy in a rental car, when petitioner was not an authorized driver under the rental contract and, while the renter gave him permission, the contract prohibited the renter from doing so.

2. Whether any such expectation of privacy was extinguished during a traffic stop when the rental car company instructed the police not to release the car to petitioner and consented to its search.

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In the Supreme Court of the United States

No. 08-1482

TOMMY ZEKE MINCEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is not published in the Federal Reporter but is reprinted in 321 Fed. Appx. 233.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2008. A petition for rehearing was denied on December 22, 2008 (Pet. App. 25a). On March 5, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 21, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of possession with intent to distribute heroin, in violation of 21 U.S.C. 841(a). He was sentenced to imprisonment for a term of 150 months, to be followed by eight years of supervised release. Pet. App. 1a-2a, 11a. The court of appeals affirmed. *Id.* at 1a-21a.

1. On October 3, 2005, a police officer stopped a car driven by petitioner for a traffic violation near Statesville, North Carolina. In response to the officer's request, petitioner produced a Michigan driver's license in the name of Kenyatta Anthony James with a photograph matching his appearance. He told the officer that he had recently moved to Georgia and gave his address. The officer also asked for the car's registration. Petitioner gave the officer a rental agreement from Armada Rental Company (Armada). He said that the car had been rented by his girlfriend in Georgia, and her name was on the rental agreement. The officer noted that the rental agreement did not identify petitioner as an authorized user. Pet. App. 3a-5a; Gov't C.A. Br. 3-4; Gov't Resp. to Mot. to Suppress Exh. 1 (GX 1).[1]

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[1] The rental agreement was signed by Janell C. Crosby. In relevant part, the second page stated:

> 1) DRIVERS: In no event shall the vehicle be used, operated or driven by any person other than (1) Renter, or (2) Additional Renter as named on page 1 of this contract. * * *
>
> 2) PROHIBITED USE: The vehicle shall not be used * * * (6) by any person not specified in paragraph 1 above.

GX 1, at 2. The first page of the rental agreement included a section stating in bold type: "ONLY THE BELOW NAMED PERSONS ARE AUTHORIZED AS ADDITIONAL DRIVERS. IF NONE, PRINT

The officer returned to his vehicle with petitioner's driver's license and the rental agreement in order to run computer checks before issuing a warning citation to petitioner. The officer ran computer checks on the driver's license number and the name on the license, but both checks indicated that no such Michigan driver's license was on file. The officer also ran a computer check on the Georgia plates and confirmed that the car was owned by Armada. The officer then called Armada, and an employee confirmed that petitioner was not an authorized user of the rental car. When the officer asked for consent to search the car, the employee responded that someone from the company would call him back. About five minutes later, a different Armada employee called the officer. She confirmed that petitioner was not authorized to drive the rental car and told the officer not to release the car to him. The employee also gave the officer permission to search the car. Pet. App. 4a-6a; Gov't C.A. Br. 5-6.

Shortly thereafter, the officer returned to the rental car and asked petitioner to step out of the car. He returned the driver's license to petitioner and handed him a warning citation. The officer explained that he had spoken with the rental company and could not release the rental car because petitioner was not an authorized driver under the rental agreement. The officer offered to drive petitioner to the next exit on the highway. Pet. App. 6a-7a; Gov't C.A. Br. 6-7.

The officer told petitioner that he and two other police officers who had arrived at the scene were going to search the car with the rental company's permission.

'NONE' ACROSS THIS SECTION AND HAVE SIGNED BY CUSTOMER." *Id.* at 1. The rental agreement given to the officer stated "None" and was initialed by "J.C.C." *Ibid.*; see also Pet. App. 7a n.3.

Petitioner consented to a pat-down for weapons, and the officer found a cell phone in his pants pocket. Petitioner asked if he could return to the car to retrieve a cell phone to call his girlfriend, who he said had given him permission to drive the car. The officer declined to allow petitioner to enter the car and reminded him that he had a cell phone in his pants pocket. Pet. App. 7a; Gov't C.A. Br. 7; C.A. App. 174.

When the officers searched the car, they found 140 grams of high-purity heroin hidden in the console around the car's gearshift. Petitioner was arrested and interviewed. He eventually admitted his true identity. Petitioner also gave the officers a statement concerning his travels but denied knowing that heroin was in the rental car. Pet. App. 7a-10a; Gov't C.A. Br. 7-8.

2. Petitioner was charged in an indictment with one count of possession with intent to distribute at least 100 grams of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). C.A. App. 10. Before trial, petitioner moved to suppress the heroin and his subsequent statements on the ground, *inter alia*, that the search of the rental car violated the Fourth Amendment. *Ibid.* At the suppression hearing, petitioner's girlfriend, Janell Crosby, testified that she rented the car for petitioner because he did not have a credit card to secure the rental. According to her testimony, petitioner accompanied her to the Armada rental office, and she drove the rental car from the parking lot to a gas station down the street, where she gave it to petitioner with her permission to drive it. C.A. App. 195-197, 209.

At the conclusion of the suppression hearing, the district court orally denied the motion to suppress. Pet. App. 23a-24a. The court ruled that petitioner, as an unauthorized driver under the rental contract, "had no

standing to contest the search and seizure of the rental car." *Id.* at 24a. The court found that "[t]he fact that Ms. Crosby may have [purported] to let [petitioner] have the car and testified that she did does not change the analysis." *Ibid.* In addition, the court found that "[t]he rental car agency gave permission for the search of the vehicle." *Ibid.*

Following trial, the jury found petitioner guilty of the single count of possession with intent to distribute at least 100 grams of heroin. The district court sentenced petitioner to 150 months of imprisonment. Pet. App. 11a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-21a. The court observed that it was "well settled that only where a search intrudes upon a space as to which an individual has 'a legitimate expectation of privacy' may the individual contest the search on Fourth Amendment grounds." *Id.* at 12a. After noting that petitioner's "subjective expectation of privacy in the rental vehicle is not in dispute," *ibid.*, the court concluded that its decision in *United States* v. *Wellons*, 32 F.3d 117 (4th Cir. 1994), cert. denied, 513 U.S. 1157 (1995), was "squarely on point" with respect to whether petitioner's subjective expectation of privacy was objectively reasonable. Pet. App. 12a. The court observed that *Wellons* held that "an unauthorized driver of a rental vehicle has no legitimate privacy interest in the vehicle," even where "the authorized lessee allows the unauthorized driver to drive the rental vehicle." *Id.* at 13a.

The court found "no persuasive reason" to overturn or alter *Wellons*. Pet. App. 13a. The court observed that the cases relied upon by petitioner were "factually distinguishable" because any permission petitioner had

from his girlfriend to drive the car "clearly terminated once the rental company affirmatively advised [the police officer] that [petitioner] * * * was not entitled to possess the vehicle and that the vehicle was not to be released to [petitioner] at the scene of the traffic stop." *Id.* at 14a n.9.

The court of appeals held that petitioner, "as an unauthorized driver under the Armada rental contract, had no legitimate expectation of privacy in the rental vehicle and cannot contest the warrantless search of the vehicle on Fourth Amendment grounds." Pet. App. 15a. In light of that holding, the court found it unnecessary to address the district court's alternative holding that the warrantless search was reasonable in light of Armada's consent. *Id.* at 15a-16a.

ARGUMENT

Petitioner contends (Pet. 8-19) that the court of appeals erred in holding that he did not have a legitimate expectation of privacy in the rental car. He further contends that the court of appeals' decision conflicts with decisions of other courts of appeals. Contrary to petitioner's contention, there is no square conflict among the courts of appeals on the questions presented. Moreover, this case is an inappropriate vehicle for resolving any tension that exists among the decisions of the courts of appeals because Armada's consent provided the officers with an independent basis for the search. Further review is therefore unwarranted.

1. An individual's ability to "claim the protection of the Fourth Amendment depends * * * upon whether" he "has a legitimate expectation of privacy in the invad-

ed place." *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978).[2] A court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure "invaded [*the defendant's*] legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980); see also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1979).

To claim the protection of the Fourth Amendment, a defendant "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas*, 439 U.S. at 144 n.12); see, *e.g.*, *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990) ("To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share."). Although legitimate expectations of privacy "need not be based on a common-law interest in real or personal property," the Court "has not altogether abandoned use of property concepts in determining the presence or absence of the

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[2] Although the Court had formerly analyzed questions concerning an individual's ability to claim Fourth Amendment protections under the rubric of "standing," the Court made clear in *Rakas* that "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." 439 U.S. at 140. Nonetheless, "standing" is sometimes used as a shorthand for having a sufficient interest to challenge a search or seizure. See *Arizona* v. *Johnson*, 129 S. Ct. 781, 787 (2009) ("A passenger," who is seized by a stop, "therefore has standing to challenge a stop's constitutionality."). Petitioner does not challenge the stop of the car, but instead challenges its search.

privacy interests protected by [the Fourth] Amendment." *Rakas*, 439 U.S. at 144 n.12.

The court of appeals correctly held that petitioner did not have a legitimate expectation of privacy in the rental car because he was an unauthorized driver under the Armada rental contract. As the owner of the car, Armada could authorize others to drive the car. Those authorized to use a car by its lawful owner generally acquire an expectation of privacy in the car. See, *e.g.*, *United States* v. *Miller*, 821 F.2d 546, 549 (11th Cir. 1987). That is because authorized users of a car have lawful possession and may legitimately expect that—within the scope of authority granted to them by the car's owner—they can exclude others from the car. See *Rakas*, 439 U.S. at 144 n.12 ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [others]."); *United States* v. *Walker*, 237 F.3d 845, 849 (7th Cir. 2001) ("A person listed as an approved driver on a rental agreement has an objective expectation of privacy in the vehicle due to his possessory and property interest in the vehicle.").

Petitioner, in contrast, did not lawfully possess the rental car because Armada had not authorized him to drive it. The consent of petitioner's girlfriend Janell Crosby, did not authorize petitioner to drive th car because she lacked that power under the terms of her rental agreement. Since Crosby had no authority to allow persons not mentioned in the rental agreement to drive the car, petitioner could not legitimately expect that he would be able to control the car and exclude others, such as Armada, from it. Accordingly, petitioner had no expectation of privacy in the car that "society is prepared to recognize as 'reasonable.'" *Rakas*, 439 U.S.

at 144 n.12 (quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); see also 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3(e) at 201-202 (4th ed. 2004) (*LaFave*) ("[M]ost courts agree that an occupant of a vehicle cannot be said to have standing by virtue of his presence if he is in possession of a stolen or otherwise illegally possessed or controlled vehicle.") (footnote omitted).

Contrary to petitioner's contention (Pet. 8-15), there is no square conflict among the courts of appeals over whether an unauthorized driver of a rental car has a legitimate expectation of privacy in the car. In addition to the court of appeals in this case, see Pet. App. 13a; *United States* v. *Wellons*, 32 F.3d 117, 119 (4th Cir. 1994), cert. denied, 513 U.S. 1157 (1995), the Fifth and Tenth Circuits agree that an unauthorized driver of a rental car does not have a legitimate expectation of privacy in the car, even when the renter purports to give him permission to drive it in contravention of the rental agreement. See *United States* v. *Seeley*, 331 F.3d 471, 472 & n.1 (5th Cir. 2003) (per curiam); *United States* v. *Boruff*, 909 F.2d 111, 117 (5th Cir. 1990), cert. denied, 499 U.S. 975 (1991); *United States* v. *Roper*, 918 F.2d 885, 886, 887-888 (10th Cir. 1990); *United States* v. *Obregon*, 748 F.2d 1371, 1374-1375 (10th Cir. 1984).[3]

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[3] Relying on *United States* v. *Kye Soo Lee*, 898 F.2d 1034 (1990), petitioner argues (Pet. 9 n.1) that the Fifth Circuit has held that a driver has a reasonable expectation of privacy in a rental vehicle so long as he has the renter's permission to drive it. In that case, the Fifth Circuit reasoned that "where a person has borrowed an automobile from another, with the other's consent, the borrower becomes a lawful possessor of the vehicle and thus has standing to challenge the search." *Id.* at 1038. The court did not discuss the terms of the rental agreement and whether it prohibited use by unlisted drivers. *Id.* at 1036. In its most recent decision addressing the privacy interests of drivers who are not

While two other circuits, the First and Sixth, have applied a "totality of the circumstances" test to similar questions, *United States* v. *Smith*, 263 F.3d 571, 586 (6th Cir. 2001); *United States* v. *Sanchez*, 943 F.2d 110, 114 (1st Cir. 1991), those courts' decisions make clear that they would not have recognized a Fourth Amendment privacy interest on the part of petitioner in the circumstances of this case. In *Sanchez*, the First Circuit refused to recognize a protected privacy interest in the driver where "at best the defendant was operating the vehicle with the authority of a person who himself had been given the authority to operate the vehicle by somebody else," *id.* at 113 (quoting district court), and the driver failed to demonstrate "a more intimate relationship with the car's owner or a history of regular use of the [car]—from which a presumption of permission [from the owner] could be drawn," *id.* at 114.

In *Smith*, the Sixth Circuit specifically "acknowledge[d] that *as a general rule*, an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle." 263 F.3d at 586 (emphasis added). The court held, however, that the case before it was "not governed by the general rule" because of its "truly unique" facts. *Ibid.* The "most significant[]" distinguishing fact was that "unlike any of the drivers in any of [the other] cases," Smith "personally had a business relationship with the rental company," including

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authorized under a rental agreement, the Fifth Circuit distinguished *Kye Soo Lee* on that ground. *Seeley*, 331 F.3d at 472 n.1. The court held that the case was controlled by *Boruff*, which specifically held that when, "[u]nder the express terms of the rental agreement," the renter of a car "had no authority to give control of the car to" another, an unauthorized driver has "no legitimate expectation of privacy in it," 909 F.2d at 117. See *Seeley*, 331 F.3d at 472 (citing *Boruff*).

having been the person who reserved the car in his name and provided the credit card that paid for the rental. *Ibid.* Smith's wife, who picked up the car, had done so using the reservation number given to Smith. *Ibid.* In the Sixth Circuit's view, those facts made Smith the "*de facto* renter." *Id.* at 587. Whatever tension might exist between the broad rule of the Fourth, Fifth, and Tenth Circuits and the totality-of-the-circumstances approach of the First and Sixth Circuits does not warrant this Court's review, at least in this case, because it is clear that those circuits applying the more context-specific approach would reach the same result as the court below on the facts of this case.[4]

Nor, contrary to petitioner's suggestion (Pet. 9-11), is there a direct conflict between the court of appeals' decision in this case and rulings of the Eighth and Ninth Circuits. Petitioner cites *United States* v. *Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006), *United States* v. *Best*, 135 F.3d 1223, 1225 (8th Cir. 1998), and *United States* v. *Muhammed*, 58 F.3d 353, 355 (8th Cir. 1995) (per curiam), as having "held that a driver has a reasonable

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[4] In *United States* v. *Cooper*, 133 F.3d 1394 (1998), the Eleventh Circuit similarly emphasized the defendant's direct relationship with the rental company. Although the rental agreement had expired, the defendant had personally rented the car and was listed as the authorized driver on the contract, and in the past the company been lenient with respect to overdue rentals. *Id.* at 1397, 1400. The Eleventh Circuit concluded that those facts made Cooper's situation "materially different" from that of an unauthorized driver. *Id.* at 1400. While the analysis in *Cooper* indicates that the Eleventh Circuit would not recognize an unauthorized driver's privacy interest, that court has not, contrary to the court of appeals' understanding (Pet. App. 13a-14a), specifically addressed that issue. Cf. *United States* v. *McCulley*, 673 F.2d 346, 352 (11th Cir. 1982) (rejecting Fourth Amendment claim by co-defendants who agreed to share expenses with the renter).

expectation of privacy in a rental car so long as he has the renter's permission to drive it." Pet. 9. Those cases do not support that proposition.

In *Muhammed*, the defendant "presented absolutely no evidence that he had been granted permission to drive the car." 58 F.3d at 355. The court of appeals thus rejected his claim of a legitimate expectation of privacy. *Ibid.* The court noted that the parties agreed that "the defendant must present at least some evidence of consent or permission from the lawful owner/renter to give rise to an objectively reasonable expectation of privacy," *ibid.*, but in the absence of any such evidence, the court of appeals had no occasion to announce any holding on the showing that would support such an expectation. Later, in *Best*, the Eighth Circuit cited *Muhammad* in remanding a case for further findings, stating that "[i]f Thomas [the renter] had granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing." *Best*, 135 F.3d at 1225. That remand order, however, does not definitively resolve the nature of the relationship required to establish such a privacy interest; in particular, the court did not discuss whether the rental contract precluded the renter from giving unauthorized persons use of the car. Finally, in *Thomas*, the Ninth Circuit rejected the defendant's claim that, although he was an unauthorized driver under the rental contract, he had an expectation of privacy. The court held that "it is undisputed that Thomas failed to show that he received [the renter's] permission to use the car." 447 F.3d at 1199. While the opinion's earlier discussion purported to reject the view that a rental agreement's failure to list the defendant as an authorized driver meant that he could not challenge a search, *id.* at 1198, the court did not have before it facts that

required it to determine when such a challenge was permitted. See *id.* at 1199 ("An unauthorized driver *may* have standing to challenge a search if he or she has received permission to use the car.") (emphasis added). In view of the ultimate rejection of the defendants' claims in *Muhammed* and *Thomas*, and the remand of the defendant's claim in *Best*, neither the Eighth nor the Ninth Circuit can be said to have definitively resolved the issue in this case in a defendant's favor. Language in the opinions does not create a square conflict on the question presented that would warrant this Court's review.[5]

2. Petitioner also seeks review (Pet. 20-22) of the court of appeals' statement, in a footnote, that any permission conferred on petitioner by the authorized driver "terminated once the rental company affirmatively advised [the officer] that [petitioner], as an unauthorized driver under the rental contract, was not entitled to possess the vehicle and the vehicle was not to be released to [petitioner]." Pet. App. 14a n.9. That issue does not warrant this Court's review.

The court of appeals observed that its discussion of the termination of any derivative authorization petitioner might have had was "not necessary to the result reached here." Pet. App. 14a n.9. In any event, that statement is correct: when a rental company instructs

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[5] In *State* v. *Van Dang*, 120 P.3d 830 (2005), also relied upon by petitioner (Pet. 9), the New Mexico Supreme Court likewise rejected the driver's Fourth Amendment claim. *Id.* at 834. The court's discussion of *Smith*, *id.* at 834 & n.1, suggests that, like the Sixth Circuit, the New Mexico Supreme Court would not treat the rental agreement as definitive in itself. But the court did not hold, because the issue was not presented, what facts would be sufficient to support a Fourth Amendment claim by a driver who was not authorized under the terms of the contract.

the police not to release a rental car to an unauthorized driver at the scene of a traffic stop, "any permission that had previously been extended to [the unauthorized driver] by the authorized driver of the rental vehicle [is] effectively extinguished by the rental company, the actual owner of the vehicle and issuer of the subject rental contract." *Ibid.*

Contrary to petitioner's claim (Pet. 20-21), the court of appeals' analysis does not conflict with the Eleventh Circuit's decision in *United States* v. *Cooper*, 133 F.3d 1394 (1998). In *Cooper*, the defendant was an authorized driver of a rental car whose rental agreement expired four days before he was stopped by a police officer. The officer called the rental company, which told the officer to tow and return the car. *Id.* at 1396. The court rejected the government's argument that the defendant ceased to have an expectation of privacy once the rental company exercised its right to repossess the car during the stop. *Id.* at 1397, 1398-1399. The court emphasized that the defendant was "listed on the rental contract as an authorized driver" and that the driver and rental company "were in privity of contract." *Id.* at 1400. The court also noted that, based on the rental company's policy, of which the driver was well aware, "a simple phone call could have extended the rental contract past the date of the warrantless search." *Id.* at 1396, 1402. In such circumstances, the court held that the defendant did not lose his legitimate expectation of privacy in the car when the rental agreement expired in the absence of any action by the rental company to enforce the agreement before the stop. *Id.* at 1400-1401.

There is no conflict between the holding in *Cooper* and the court of appeals' decision in this case. Indeed, the Eleventh Circuit stressed in *Cooper* that, as the per-

son "listed on the rental contract as an authorized driver," the defendant's "expectation of privacy was materially different from that of" an unauthorized third-party driver such as petitioner. 133 F.3d at 1400. Thus, there is no conflict on the second question presented by petitioner, and it does not warrant this Court's review.

3. This case is not a suitable vehicle for addressing an unauthorized driver's reasonable expectations of privacy in a rental car because the search of the rental car was valid even assuming petitioner had a reasonable expectation of privacy. As the district court ruled, the consent given by Armada, the rental company that owned the car, provided a valid basis for officers to search the car under the Fourth Amendment. Pet. App. 24a; see generally *Georgia* v. *Randolph*, 547 U.S. 103, 110-112 (2006); *United States* v. *Matlock*, 415 U.S. 164, 169-171 & n.7 (1974).

So long as the rental car was in the lawful possession of Crosby, the bailee, Armada, as the bailor, generally could not consent to a search of the car. See 4 *LaFave* § 8.6(b) at 245; cf. *Stoner* v. *California*, 376 U.S. 483 (1964) (night hotel clerk could not validly consent to search of guest's room); *Chapman* v. *United States*, 365 U.S. 610 (1961) (landlord could not validly consent to search of house that he rented to another). Here, however, petitioner was not the bailee of the car, and he was not in lawful possession of it. Rather, he was an unauthorized user who was driving the car in direct violation of the terms of the rental agreement between Armada and Crosby. In those circumstances, the district court correctly concluded that Armada's consent justified the search. See *State* v. *Hill*, 94 P.3d 752, 758-759 (Mont. 2004); cf. 4 *LaFave* § 8.6(c) at 245-247. In *Randolph*, the Court declined to hold that one resident of a home could

consent to a search of the domicile over the objection of another resident who was present and asserting his refusal to permit entry. 547 U.S. at 114. The Court stressed "[t]he want of any recognized superior authority among disagreeing tenants." *Ibid.* But the rental company that owns a car does have superior rights over an individual who is not a party to the rental agreement and whose driving of the car is specifically prohibited by that contract. See *Hill*, 94 P.3d at 758.

Although the court of appeals found it unnecessary to address the issue, Pet. App. 15a-16a, the government is entitled to defend the favorable judgment of the court of appeals on that additional ground before this Court. *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Accordingly, because the rental car company's consent provided an independent justification under the Fourth Amendment to search the rental car, petitioner's claims that the courts below incorrectly ruled that he lacked a legitimate expectation of privacy in the rental car do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

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TOMMY ZEKE MINCEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

The government disputes the obvious and glosses over the complex. Courts (including the court below) and commentators have expressly acknowledged a three-way split concerning whether someone who drives a rental car with the renter's permission, but without the owner's permission, has a reasonable expectation of privacy in the car. But the government claims that there is merely "tension" and cursorily claims that the Fourth Circuit's rule is correct.

Neither of the government's claims has merit. The lower courts are indeed in deep and acknowledged conflict, and the Fourth Circuit's rule—which, as the government concedes, equates unlisted rental-car drivers with car thieves—is incorrect.

What is more, the government relies upon its mistaken view of the merits when purporting to identify independent reasons to deny certiorari. In asserting that the police officers validly searched the rental car because Armada instructed them not to release it to Mincey, or because Armada consented to the search, the government assumes that Mincey never possessed a protected privacy interest in the car. But that assumption is precisely what has generated so much controversy in the lower courts. Far from supplying independent grounds to deny certiorari, the government's repeated reliance on a startling claim—that driving a rental car with only the renter's permission is, for purposes of the Fourth Amendment, just like stealing it—confirms that this Court should grant certiorari.

I. There Is An Irreconcilable Conflict In The Lower Courts

The government does not deny that federal courts of appeals and state courts of last resort have articulated different standards for deciding the Fourth Amendment claim of a person who drives a rental car with permission from the renter but not the rental company. Nor does it dispute the reasons set out in the petition and the *amicus* brief for arguing that a lower-court split on that issue—which arises time and again in federal and state court—would warrant this Court's review. It claims, however, that there is no actual conflict that requires this Court's review. Br. in Opp. 9 – 13.

That claim is unique to the government, newly minted for the government's brief in opposition, and incorrect. Many cases and commentaries—including the only commentary cited by the government—recognize that the lower courts follow "conflicting" rules on the first question presented here. 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3 at 26 n.300 (4th ed. Supp. 2008-09) (*LaFave*); see Br. in Opp. 9.[1]

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[1] See, *e.g.*, Pet. App. 13a – 15a (recognizing the split); *United States* v. *Thomas*, 447 F.3d 1191, 1196 – 97 (9th Cir. 2006) (same); *United States* v. *Haywood*, 324 F.3d 513, 516 (7th Cir. 2003) (same); *State* v. *Nelson*, No. A-09-082, 2009 WL 2342734, *5 (Neb. Ct. App. July 28, 2009) (unpublished) ("We decline to adopt the approach taken by the 4th, 5th, and 10th Circuits as urged by the State and instead, adopt the permission test employed by the Eighth Circuit."); see generally Justin E. Simmons, Comment, *Hertz and the Fourth Amendment: A Post-*Rakas *Examination of an Unauthorized Driver's Standing to Challenge the Legality of a Rental Car Search*, 15 GEO. MASON L. REV. 479 (2008); Matthew M.

Before filing its brief in opposition, the government appeared to have joined that consensus. It acknowledged at oral argument below that the Eighth and Ninth Circuits have held "that there is a reasonable expectation of privacy where the defendant is driving with the renter['s] or lessee's permission." 9/23/2008 Oral Argument CD at 18:44 to 18:56; see also Brief of United States at 10, *United States* v. *Brice*, 157 F.3d 906 (11th Cir. 1998) (unpublished) (No. 07-3453), 1998 WL 34184921 ("The courts of appeals are split as to when a defendant who is neither the renter of a rental vehicle nor an authorized driver has a legitimate expectation of privacy in the vehicle.").

The government was right the first time: The lower courts are indeed split. The government's contrary claim, like its defense of the Fourth Circuit's rule, is mistaken.

A. The government argues that the Eighth and Ninth Circuits have rejected the Fourth and Tenth Circuits' rule only in dicta. Br. in Opp. 11-13. But, in fact, the Eighth and Ninth Circuits have squarely held that a person who is not listed as an authorized driver on a rental agreement has a reasonable expectation of privacy in the rental car if an authorized driver permitted him to drive it. *United States* v. *Thomas*, 447 F.3d 1191 (9th Cir. 2006); *United States* v. *Best*, 135 F.3d 1223 (8th Cir. 1998); *United States* v. *Muhammed*, 58 F.3d 353 (8th Cir. 1995).

Shafae, Note, United States v. Thomas: *Ninth Circuit Misunder-"Standing": Why Permission To Drive Should Not Be Necessary To Create An Expectation Of Privacy In A Rental Car*, 37 GOLDEN GATE UNIV. L. REV. 589 (2007).

In *Best*, the Eighth Circuit rejected the government's argument that the defendant could not "challenge the validity of the search because the rental agreement did not list Best as an authorized driver." 135 F.3d at 1225. The court therefore remanded the case with this instruction: "If [the authorized driver] had granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing." *Id.* at 1225.[2]

Best's "explicit directives * * * to the lower court concerning proceedings on remand are not dicta." *Cole Energy Dev. Co.* v. *Ingersoll-Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993) (Posner, C.J.). Thus, in cases like this one, district courts of the Eighth Circuit must give *no weight* to a driver's status under a rental agreement. They must instead protect the privacy interests of an unlisted driver so long as he received the renter's permission to drive it. See, *e.g.*, *United States* v. *Humphrey*, No. 8:02cr56, 2002 WL 1485387, *3 (D. Neb. July 10, 2002) (explaining that, under *Best*, "[t]he presence or availability of the authorized driver is immaterial"). The government does not point to a single decision within the Eighth Circuit questioning that *Best* squarely decided the issue, much less one adopting the conflicting interpretation of the Fourth Amendment applied in the decision below.

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[2] As the government notes (Br. in Opp. 7 n.2), courts occasionally "use 'standing' to refer to the threshold substantive determination of whether [a defendant] has a reasonable expectation of privacy under the Fourth Amendment." *United States* v. *Smith*, 263 F.3d 571, 582 (6th Cir. 2001).

The Ninth Circuit follows the same rule. In *Thomas*, it "agree[d] with the Eighth Circuit: An unauthorized driver may have standing to challenge a search if he or she has received permission to use the car." 447 F.3d at 1199. That holding, Judge O'Scannlain explained, meant "reject[ing] the government's contention that a defendant not listed on a lease agreement lacks standing to challenge a search." *Id.* at 1198.

That explicit rejection of the Fourth and Tenth Circuits' rule was not idle dictum. A statement that "explains the Court's rationale * * * is part of the holding." *United States* v. *Bloom*, 149 F.3d 649, 653 (7th Cir. 1998) (Easterbrook, J.); see also *Cetacean Community* v. *Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) ("'[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.'") (citation omitted). Thus, although the defendant in *Thomas* had not obtained anyone's permission to drive the rental car—and thus would have fared poorly under several rationales—the rationale actually selected by *Thomas* binds federal courts in the Ninth Circuit. See, *e.g.*, *United States* v. *King*, 560 F. Supp. 2d 906, 915 (N.D. Cal. 2008) (relying on *Thomas* in granting a motion to suppress evidence discovered in a rental car).[3] Again, the

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[3] For the same reason, the government's claim that the New Mexico Supreme Court has not decided this issue is incorrect. Br. in Opp. 13 n.2. That court, like the Ninth Circuit, has rejected a driver's Fourth Amendment claim—where the driver did not even assert that the renter permitted him to drive the rental car—*after* "agree[ing] [with the Eighth Circuit]

government points to no authority from within the Ninth Circuit suggesting otherwise.

B. Just as it overlooks the *existence* of the Eighth and Ninth Circuits' rule, the government overlooks the *significance* of the totality-of-the-circumstances tests applied elsewhere. In particular, its claim that the First and Sixth Circuits would not have recognized a privacy interest in this case (Br. in Opp. 10-11), even if true, is not a reason to deny certiorari.

For starters, every contextual test—by "refus[ing] to adopt a bright line test" that looks only to the rental agreement (*United States* v. *Smith*, 263 F 3d 571, 586 (6th Cir. 2001))—necessarily conflicts with the Fourth and Tenth Circuits' bright-line rule.

To downplay that conflict, the government cherry-picks among the contextual tests; it focuses on the First and Sixth Circuits, while ignoring Texas. See *Parker* v. *State*, 182 S.W.3d 923 (Tex. Crim. App. 2006). As we explained in the petition (at 13), the Texas Court of Criminal Appeals in *Parker* "disagree[d] with the * * * use of a bright-line rule stating that only those listed on a rental agreement as authorized drivers have an expectation of privacy in the vehicle and standing to contest a search." *Id.* at 927. Looking instead to the surrounding "circumstances," the court held that the defendant had possessed a protected privacy interest in the

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that * * * where the driver is neither the renter nor listed on the rental contract as an authorized driver, the burden is on the driver to present evidence of consent or permission from the lawful owner or renter to be in possession of the vehicle in order to establish standing to challenge a search of the vehicle." *State* v. *Van Dang*, 120 P.3d 830, 834 (N.M. 2005).

rental car because "he had [the renter's] express permission to drive [it]," and because "[t]here is nothing in the record that indicates that he knew about the terms of the car rental agreement or that he knew the agreement did not list him as an authorized driver." *Ibid.*

The government does not even acknowledge *Parker*, let alone dispute that petitioner would have prevailed under its reasoning. It therefore has not rebutted petitioner's contention that the Fourth Circuit's bright-line rule squarely conflicts with Texas's contextual test.

Texas's test is also significant for an additional reason: Even assuming that the Fifth Circuit has actually decided to follow the Fourth and Tenth Circuits' rule—as the government claims (Br. in Opp. 9 & n.3; but see Pet. 9 & n.1)—then there is also a conflict within Texas between the Fifth Circuit and Texas's highest criminal court. That fact alone warrants this Court's review.

C. The government devotes much of its brief in opposition to the merits. Br. in Opp. 6-9. In doing so, it asserts that driving a rental car with the renter's but not the owner's permission is "not lawful[] possess[ion]." Br. in Opp. 8.

The government offers no support for that assertion. It does not deny that this Court has deemed conduct "wrongful" for purposes of the Fourth Amendment only when it violates criminal law. See Pet. 17. Nor does it dispute that unlisted drivers frequently receive permission from renters to drive rental cars. Thus, the government does not explain why society would equate an unlisted driver—whose conduct violates a contract to which

he is not even a party—with a car thief, whose conduct violates criminal law.

Consequently, as the court explained in *Parker*, the government's argument founders: "We fail to see how the fact that the car was a rental changes an individual's expectation of privacy in a car that he borrowed from his girlfriend. [The defendant] did not steal the car; he did not even use it without [his girlfriend's] knowledge." 182 S.W.3d at 927.

II. The Government Defense Of The Fourth Circuit's Extinguishment Rationale Is Incorrect And Demonstrates Why This Case Is An Ideal Vehicle For Certiorari

The government's approach to the second question presented—whether Mincey's expectation of privacy, if any, was extinguished when the car rental company instructed the police not to release the car to him—mirrors its approach to the first question. Specifically, the government combines a flawed denial of a circuit split with a bare assertion that the Fourth Circuit "is correct." Br. in Opp. 13.

A. The government claims that the Fourth Circuit's extinguishment rationale does not conflict with *United States* v. *Cooper*, 133 F.3d 1394 (11th Cir. 1998). *Cooper* held that a phone call from the police to a car rental company cannot extinguish the protected privacy interest of someone in possession of a rental car. *Id.* at 1401. To distinguish *Cooper*, the government argues that Cooper was not "an unauthorized third-party driver such as petitioner." Br. in Opp. 15.

That argument simply reprises the government's belief that "unauthorized third-party drivers" never possess protected privacy interests in rental cars. The Fourth Circuit's extinguishment rationale, however, holds that even if those drivers *do* possess protected privacy interests—*i.e.*, even under the Eighth and Ninth Circuits' "line of cases" (Pet. App. 14a n.9)—those interests can be extinguished by phone calls between the police and car rental companies. That holding directly conflicts with *Cooper*, which held that those phone calls do not extinguish protected privacy interests.

The government's insistence that Mincey lacked a protected privacy interest in the rental car also appears to be its only basis for asserting that the Fourth Circuit's extinguishment rationale "is correct." Br. in Opp. 13. But if a defense of the extinguishment rationale must rely on the Fourth Circuit's holding concerning the first question presented, then, as suggested in the petition, the extinguishment rationale "represents no alternative at all." Pet. 22.

B. The government's linkage of the two questions presented confirms that this Court should decide them both in a single case. See Pet. 23 – 25. While the petition explained that the two questions are factually interrelated—because police officers often call car rental companies when they stop unlisted drivers—the government's arguments presume that they are legally interrelated as well. For that reason, addressing both questions together will enable this Court to provide maximum guidance in one case, as opposed to piecemeal guidance in two cases. The Court should therefore address both questions in one fell swoop.

That, of course, is what the Fourth Circuit did below; it simply reached the wrong conclusions. In holding that Mincey's expectation of privacy was unreasonable or, alternatively, extinguished, the Fourth Circuit elevated a rental company's expectations over "the everyday expectations of privacy that we all share." *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990).

III. The Car Rental Company's Purported Consent To The Search Is Not A Reason To Deny Certiorari

Finally, the government claims that the car rental company's consent justified the search of Mincey's car. But the government acknowledges, as it must, that the Fourth Circuit expressly did not reach this issue. Br. in Opp. 16; Pet. App. 15a – 16a. So it is no barrier to this Court's deciding the questions presented here.

If this Court grants certiorari and decides the two questions presented, the Fourth Circuit will of course consider the consent issue on remand. But if this Court denies certiorari, the lower courts will continue to apply conflicting rules in numerous cases involving unlisted drivers. Allowing those conflicts to persist, out of concern for an issue that the court of appeals did not even reach, would serve no purpose.

Moreover, it is easy to see why the Fourth Circuit did not reach the consent issue. If Mincey possessed a reasonable expectation of privacy while driving the rental car, and if his expectation survived the rental company's instruction not to release the car to him, then the company's consent could *not* have authorized the search over Mincey's objection.

The cases cited by the government prove that point. In *United States* v. *Matlock*, 415 U.S. 164 (1974), this Court held that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id.* at 170. More recently, in *Georgia* v. *Randolph*, 547 U.S. 103 (2006), this Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120.

It follows that consent by a *physically absent* party is not valid against a *present, nonconsenting* party who has a reasonable expectation of privacy in the place searched. Thus, if Mincey had a reasonable expectation of privacy in the rental car, Armada could not have telephonically authorized the police to search it. See, *e.g.*, 4 *LaFave* § 8.6(c) at 245 (4th ed. 2004) ("[U]nder ordinary circumstances the bailor may not consent to an intrusion into the bailee's possessory interest."), cited in Br. in Opp. 15; *United States* v. *Kelly*, 414 F. Supp. 1131, 1146 (W.D. Mo. 1976) (holding that a car rental company could not authorize the search of its car even though the renter's contract had expired), rev'd in part on other grounds, 547 F.2d 82 (8th Cir. 1977).

The government's contrary argument falls back on the claim that Mincey "was not in lawful possession" of the rental car. Br. in Opp. 15. Thus, once again, the government has failed to mount any defense of the Fourth Circuit's ruling that does not reference the court's conclusion that Mincey lacked a reasonable expectation of privacy in the rental car. It

has succeeded, however, in showing that several legal issues relate to the question whether Mincey's privacy expectation was reasonable. Because that recurring question has fractured the lower courts, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

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TOMMY ZEKE MINCEY,
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UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys,

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief.

in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 amicus curiae briefs each year on various issues in this Court and other courts. NACDL previously filed amicus curiae briefs in this Court in cases, like the present one, involving the validity of warrantless automobile searches under the Fourth Amendment. *See Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710 (2009) *and* 540 U.S. 963 (2003).

INTRODUCTION

As petitioner has clearly demonstrated, and as the courts of appeals have acknowledged, the circuits are deeply split in three ways on the issue of whether a person driving a rental car with the renter's permission but without the agreement of the rental company has a reasonable expectation of privacy in that vehicle. *See* Petition for Writ of Certiorari, 8 - 13. The purpose of this amicus brief is to highlight the importance of the matter on which the circuits are so divided. The operation of rented vehicles by so-called unauthorized drivers is common under any number of circumstances. A large percentage of the American population is likely, at some point in time, to find itself behind the wheel of a rented car or truck

without the direct imprimatur of the rental company. As the costs of car ownership impose a heavier financial burden, and as the limitations on authorized rentals continue to expand, the number of individuals driving rental cars with only the renter's permission is likely to grow. The issue of whether these drivers have a reasonable expectation of privacy is certain to recur with regularity.

Furthermore, given the increasing frequency with which individuals drive rental cars with only the renter's permission, as well as the increased reliance of the American public on this and other forms of the socially useful practice of car sharing, it would appear that society perforce recognizes the practice as reasonable. A necessary corollary of this general acceptance is the widespread assumption that those who operate cars (whether rented or not) with the operator's permission have a reasonable expectation of privacy just as owners and renters do.

ARGUMENT

I. AMERICANS RELY ON CARS, INCLUDING RENTAL CARS, TO FUNCTION IN SOCIETY

A. The Automobile is a Central Component in American Life

Over the course of the last century, almost every aspect of American life has been reshaped by an increasing dependence on the automobile. Our cities sprawl; our children move far away; our business is conducted by cell phone as we sit in traffic. The geography of our lives would be unrecognizable to a man or woman from the early 20th century, who

typically would have lived his or her entire life within a radius of 20 miles.

Today most Americans live far from their work sites, their schools, and their "local" shops. Networks of friends and families are scattered through other neighborhoods, cities, and states. The car has made this transformation possible, perhaps as its major catalyst. Public transportation is a very limited option for most Americans under most circumstances. Access to automobiles has become an inescapable necessity for navigating the landscape of modern American lives.

These statements find their most powerful support in the experiences of our daily lives; statistics and sociological studies abound to substantiate their truth. As just one example: every 5-10 years the U.S. Department of Transportation collects data throughout the nation on the travel behavior of the American public. The government conducts analyses of these statistics, and makes the data available for researchers to use in their own work. *See* U.S. Dep't of Transp., Fed. Highway Admin., Nat'l Household Travel Survey [hereinafter NHTS], *Guide for New Users*, *available at* http://nhts.ornl.gov/quickStart.shtml. One of the papers analyzing the data collected by the NHTS over the last 40 years confirms that the reliance of Americans on cars for work and all travel purposes is ever-increasing. John Pucher and John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 Transport. Q. 49, 49-50 (2003).

Indeed, as of 2006, 88% of American workers drove to their jobs. *Opportunity and the Automobile*, excerpted from Poverty & Race (January 1, 2006), available at http://www.highbeam.com/DocPrint.aspx

?DocID=1P3:1025134641. A majority of jobs are located in the suburbs, which are poorly served by mass transit. *Id.* Residents of inner cities with access to vehicles have been found to have access to an astounding 59 times as many jobs as those of their neighbors who are dependent on public transportation. *Id.* Car-less, low-income families who live in the suburbs – nearly half of all metropolitan poor – are even more isolated from available jobs. *Id.*

Likewise, immigrant households include a higher number of unskilled workers than non-immigrant families; and these workers generally must travel longer distances to work. *Travel Characteristics of New Immigrants*, NHTS Brief (2006), *available at* http://nhts.ornl.gov/briefs/Immigrant%20Travel.pdf. Immigrant households, however, have lower rates of vehicle ownership. *Id.*

Available data provide support for another fact that appears obvious – car ownership, vital as it is, is too expensive for many Americans. Although car ownership rates increase dramatically as incomes rise, 26.5% of low-income households cannot afford a motor vehicle. Pucher and Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 Transport. Q. at 55. When these households do own a car, that vehicle is often unreliable; the average age of vehicles in low-income households surveyed in 1995 was 10 years old, compared to 7.3 years old for other households. Elaine Murakami and Jennifer Young, *Daily Travel by Persons with Low Income* (Paper for NPTS Symposium, U.S. Dep't of Transport., 1997), *available at* http://nhts.ornl.gov/1995/Doc/LowInc.pdf.

Although lower-income Americans are less able to afford a car, in many ways they rely on automobiles

more than their more-fortunate neighbors and make most of their trips in privately-owned vehicles. Murakami and Young, *Daily Travel*, at 1. People in low-income households are also more likely to drive long distances than people in high-income households, who can afford to fly. *Long-Distance Travel*, NHTS Brief (2006), *available at* http://nhts.ornl.gov/briefs/Long%20Distance%20Travel.pdf.

For these segments of American society, car rental is an expedient and often necessary option by which they and their households can meet their transportation needs.

B. Pro Tem Car Rental is an Increasingly Viable Alternative to Car Ownership

When a car breaks down, its owner still has to get to work somehow. Even a person who can manage the usual routine without a car must sometimes travel outside the confines of public transportation to attend a wedding or funeral, see a doctor, or interview for a new job. When a household moves, items too large to fit in a trunk have to be transported. In all these instances and many more, a rental car or truck can be the best, even the only, option.

Studies conducted by the rental car industry show a steady growth. In 1998, with 1,644,000 cars in service, industry revenue was $17.2 billion. *2008 Market Data [U.S. Car Rental Market]*, Auto Rental News (2008), at 4, *available at* http://www.fleetcentral.com/resources/ARNFB09UScarrentalRevenue.pdf. By 2008, the number of cars in service had grown to 1,813,000, with revenues up to $21.88 billion. *Id.* These figures do not take into account the burgeoning membership in carsharing and short term auto use organizations. *See* Susan A. Shaheen,

et al., *North American Carsharing: A Ten Year Retrospective*, 2009 Transportation Research Board Annual Meeting (Nov. 15, 2008), http://76.12.4.249/artman2/uploads/1/UCD-ITS-RR-08-38.pdf. Nor do they include the numbers for the recently-developed and quickly growing Zipcar model of car rental. This new Zipcar system makes renting a car by the hour or day in the cities where the service is available. Zipcar, *Home*, http://www.zipcar.com/. The Zipcar website provides the following reasons, among others, why someone might want to rent one of its vehicles: 1) "I take public transit, but need a car sometimes"; 2) "I want to save money [over car ownership]"; 3) "I don't want the hassle of owning a car"; 4) "I want to do my part to take care of our planet"; 5) "Once in a while I need a second car"; and 6) "I need a big car for a big job." Zipcar, *Is a zipcar for me?*, http://www.zipcar.com/is-it/. For all of these reasons and more, reliance on rental cars is becoming ever-more firmly entrenched in American routine.

C. Authorization to Drive a Rental Car is Limited in Many Ways

A large percentage of rental car drivers, though, are bound to be unauthorized, at least in the view of the rental car company. Rental car contracts can be up to 63 pages in length, with a great deal of small print. Irma S. Russell, *Got Wheels?: Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 Loy. L.A. L. Rev. 135, 150-51 (2006). The typical contract will contain numerous circumstances and acts – such as driving the rental car outside of a delimited geographical area – which render the contract void and purport to cancel the driver's authorization. Most renters will not read the "terms and conditions" of rental in their

entirety, not only due to the length and complexity of the contracts, but also to the fact that they cannot change its terms and still rent the car. *Id.* at 149-51. A common condition of a car rental agreement is that the car may not be driven to and in another state; doing so voids the contract and converts the renter into an unauthorized driver.

The practices of rental car companies also exclude a notable percentage of licensed drivers from direct access to their rental vehicles. One area of exclusion is by age. To rent from National Car Rental, for example, the primary renter must be age 25 or older, with certain exceptions.[2] National Car Rental, *Age Requirement*, http://www.nationalcar.com/index.do?action=/itemDetails.do?HelpItemID=AGE. Other agencies such as Hertz allow people age 21 and over to rent their vehicles, but impose an additional charge of up to $27 per day for those customers between the ages of 21 and 25. The Hertz Corporation, *Minimum Age to Rent a Car*, https://www.hertz.com/rentacar/customersupport/index.jsp?targetPage=faqsRightNow.jsp&leftNavUserSelection=globNav_8_1. Rental companies therefore exclude at least all licensed drivers between ages of 16 and 21 and often impose a high fee for those between the ages of 21 and 25. Many young but fully licensed adults will therefore be left off of car rental contracts, but nonetheless will operate those vehicles with only the permission of the older adult who actually rents the car.

Enterprise Rent-A-Car, the car rental industry leader with 33% market share, requires a deposit on

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[2] In 2006, there were nearly 27 million licensed drivers under the age of 25. U.S. Department of Transportation, Federal Highway Administration, *Highway Statistics 2006*, http://www.fhwa.dot.gov/policy/ohim/hs06/htm/d122.htm#foot1.

all rentals which can be made only with a major credit card in the name of the renter. Enterprise Rent-A-Car Customer Service, *What payment method can I use to pay for my rental?* http://enterprise.custhelp.com/app/answers/detail/a_id/171/related/1. Once the rental car is returned, Enterprise will accept final payment of the rental charges made with a debit card or traveler's checks; however, the initial deposit must be made with a major credit card. *Id.* This policy effectively bars direct rentals by as many as one of four U.S. consumers who live without credit cards. LaRita Heet, *Some live without credit cards – could you? How and why 25 percent of Americans live a cash-only life*, CreditCards.com, Aug. 8, 2008, http://www.creditcards.com/credit-card-news/living-without-credit-cards-1267.php. Apparently, Enterprise and other rental car companies view the lack of a credit card as a sign that a renter is a credit risk, and may be less trustworthy to return the vehicle. Steve Holt and Connie Prater, *Renting a car with a debit card or cash? Expect to try harder*, Credit Cards.com, Updated July 2, 2008, http://www.creditcards.com/credit-card-news/rent-car-debit-credit-card-1276.php. It is predictable that many of those who lack credit cards, when needing to rent a car, will opt to ask a friend or relative with a credit card to obtain the vehicle, and then drive it with the renter's permission, rather than to apply for credit or go without the rental.

Finally, some families do not list additional drivers on the contract because the car rental companies charge extra for each driver beyond the initial customer. Others might plan to have only one person in the group do all the driving, but might run into unforeseen circumstances, such as sickness, injury or even mere fatigue. Another family might arrive at an

airport with little time, and send one driver to pick up the luggage, while the other driver rents the car alone.

No doubt, the restrictions and exclusions promoted by the terms and conditions of the contracts addressed above are intended primarily to protect the rental car companies' capital investment in their cars. One would expect a rental car company to take reasonable steps to protect its assets and the means by which it earns a profit. But should the companies' prudence in fiscal matters control when assessing the reasonableness of a driver's expectation of privacy in the rental car – whether the driver was authorized by the rental car company or by the authorized renter who initially rented the vehicle? After all, it would seem that the rental car company ceded its possessory interest in the vehicle upon renting it out. It would make little sense that a driver of a rental car who, for example, crosses a state line leaves behind his or her reasonable expectation of privacy at the border. Likewise, it does not seem logical for the reasonableness of a driver's expectation of privacy to hinge on whether the driver is 25 years of age or older or whether the driver has a major credit card. Because of the split of authority in the circuits, these and similarly important questions regarding societal views and the Fourth Amendment have not been uniformly answered.

II. UNAUTHORIZED DRIVERS WHO HAVE THE PERMISSION OF THE RENTER HAVE A SOCIALLY-RECOGNIZED REASONABLE EXPECTATION OF PRIVACY

The driver of the rental car in this case, petitioner Tommy Zeke Mincey, drove the vehicle with the permission of the renter. Indeed, Mincey's friend

rented it specifically for his use. He did not have the explicit authorization of the rental car company. No one claims he lacks a subjective expectation of privacy in the car and its contents. The open and, in our view, important question is whether society is prepared to accept Mincey's subjective expectation of privacy as reasonable, thus entitling him to contest the warrantless search of the car on Fourth Amendment grounds.

The Fourth Amendment to the United States Constitution provides the right of individuals to be free from unreasonable searches and seizures. U.S. Const. amend. IV. To have standing to challenge the legality of a search, an individual must establish (1) a subjective expectation of privacy in the place searched, and (2) that such expectation is one that society is prepared to recognize as reasonable. *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (relying on *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *see also Rakas v. Illinois*, 439 U.S. 128, 143-144, n. 12 (1978).

There is no set formula that will determine in all cases those expectations of privacy that society will recognize as reasonable. *See O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable."); *Ciraolo*, 476 U.S. at 220; *Oliver v. United States*, 466 U.S. 170, 177 (1984). Rather, the courts give weight to a number of considerations, including whether the activity in question serves functions recognized as valuable by society. *See, e.g., Carter*, 525 U.S. at 89; *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990); *United States v. Gamez-Orduno*, 235 F.3d 453, 458 (9th Cir. 2000);

United States v. Vega, 221 F.3d 789, 798 (5th Cir. 2000). For example, in *Minnesota v. Olson*, this Court held that individuals who stay overnight in other people's homes have a legitimate expectation of privacy because such stays are viewed as socially valuable. 495 U.S. at 98-99. The Court explained that:

> Staying overnight in another's home is a long-standing social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Id. at 98.

Echoing this Court's social function analysis in *Olson*, 495 U.S. at 98-99, the Fifth Circuit in *United States v. Smith* emphasized that any Fourth Amendment standing inquiry should take into account what role the activity in question plays in society. 978 F.2d 171, 177 (5th Cir. 1992). In *Smith*, a defendant sought to suppress evidence derived from the interception of his wireless phone conversations. Although the defendant failed to show a subjective reasonable expectation of privacy, the court proceeded to address the second prong of the standing test. The court recognized the "vital role" the telephone plays in modern communication and the rapid growth of wireless technology. *Id.* at 177

(quoting *Katz*, 389 U.S. at 352). When making Fourth Amendment privacy determinations, the Fifth Circuit suggested looking to social utility and society's reliance on the activity in question in order to keep from inadvertently and unwisely stripping people of their privacy rights. *Id.*

Thus, in determining whether an individual's subjective expectation of privacy is one that society will recognize, the Court must consider whether the activity in question serves functions recognized as valuable by society. *Olson*, 495 U.S. at 98-99. As the statistics discussed above indicate, society greatly relies upon the automobile to satisfy both the everyday and extraordinary needs of individuals and families. Travel by means of a car is virtually essential for work, school and play – to meet our many familial and social obligations; to visit, to travel, and to recreate; to get to the many places and do the many things our diverse lives and society require of us. The sharing of vehicles, including rentals, is a custom and practice which is growing more and more common and which serves a function possibly as vital and valuable as car ownership itself.

As discussed, many drivers, especially in poorer communities, lack an established credit history or do not own credit cards. Many are under the age of 25. It is extremely difficult for them to rent vehicles. These drivers are often forced to seek the assistance of family members and friends when the need to rent a vehicle arises.

Courts recognize that the use of rental cars by unlisted drivers is a common practice in today's society. According to the Supreme Court of Florida, the use of rental cars by unauthorized drivers is "[i]n the very nature of modern automobile use." *Roth v. Old*

Republic Ins. Co., 269 So. 2d 3, 6-7 (Fla. 1972). The practice is "foreseeable," *id.*, and its frequency is "exceedingly great," *Motor Vehicle Acc. Indemn. Corp. v. Continental Nat. Am. Group Co.* 35 N.Y.2d 260, 264-65 (1974); *see also Thrifty Car Rental, Inc. v. Crowley*, 177 Misc. 2d 1021, 1023 (Sup. Ct. Albany County 1998) (referring to the use of rental cars by unlisted drivers as "a common scenario"); *State v. Cutler*, 159 P.3d 909, 912 (Idaho Ct. App. 2007) (acknowledging "the increasingly common utilization of rental vehicles for a myriad of purposes").

A rigid holding, like that of the Fourth Circuit below, that all unlisted drivers lack a legitimate expectation of privacy in rental cars effectively strips away basic Fourth Amendment protections from a sizeable and growing portion of society for little reason other than slavish adherence to the literal dictates of what can fairly be described as contracts of adhesion. *See generally People v. Alamo Rent A Car, Inc.*, 620 N.Y.S.2d 695 (1994) (granting petition to permanently enjoin rental agencies from refusing to rent automobiles to renters under age 25); *see also* Russell, *Got Wheels?: Article 2A, Standardized Rental Car Terms*, etc., 40 Loy. L.A. L. Rev. 135 (2006) (analyzing adhesive terms and possible unconscionability in rental car contracts). By contrast, the realistic approach espoused in *Minnesota v. Olson*, 495 U.S. 91 (1990), more reasonably addresses the social function or utility of a given practice, finding that similar arrangements between friends and family members are sufficiently valuable and useful that society is willing to accept them as reasonable.

In determining whether an individual's subjective expectation of privacy is reasonable, courts also consider the type and nature of the place searched and

the related expectation of privacy in such a place. *See, e.g., Carter*, 525 U.S. at 101 (Kennedy, J., concurring); *United States v. Crisp*, 542 F. Supp. 2d 1267, 1275 (M.D. Fla. 2008); *United States v. Gerena*, 662 F. Supp. 1218, 1237 (D. Conn. 1987). "Societal understanding" of what deserves "protection from government invasion" is key under the Fourth Amendment. *Oliver*, 466 U.S. at 178. While there is a societal understanding that a driver's privacy interest in his vehicle is less substantial than that in his home, the former interest is nevertheless important and deserving of constitutional protection. *Arizona v. Gant*, __U.S. __, 129 S.Ct. 1710, 1720 (2009); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); *U.S. v. Moore*, 562 F.2d 106, 112 (1st Cir. 1977).

With respect to rental cars, unlisted drivers' expectations of privacy are as reasonable as those of other drivers given traditional notions of privacy and societal understandings derived from communal norms. *See generally Mincey v. Arizona*, 437 U.S. 385 (1978); *Rakas*, 439 U.S. 128; *United States v. Oliver*, 657 F.2d 85, 87 (6th Cir. 1981). Like overnight guests, unlisted drivers do not have an ownership interest in the premises searched, but they do expect privacy. As many courts have recognized, the constitutional question of privacy should not be controlled by a lease agreement or subtle distinctions of landlord-tenant law, but by what society recognizes as acceptable and worthy of protection. *See generally United States v. Thomas*, 447 F.3d 1191, 1197-99 (9th Cir. 2006); *United States v. Owens*, 782 F.2d 146, 150 (10th Cir. 1986); *United States. v. McClendon*, 86 Fed. Appx. 92, 2004 WL 68516, * 3 (6th Cir. Jan. 12, 2004) (holding that sublettors also have a legitimate expectation of privacy in their bedrooms even when such housing arrangements violate the tenant's rental agreement

with the housing authority). As sharing vehicles has become commonplace in society, so has using rental cars by unlisted drivers. The societal functions served by the practice are valuable. These functions should not be discouraged. Nor should this large segment of society that shares cars be denied Fourth Amendment protections because of "arcane distinctions developed in property and tort law." *See Rakas*, 439 U.S. at 143.

CONCLUSION

For the reasons explained above, the petition should be granted.

Respectfully submitted,

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